## QUESTION PRESENTED

MAY A DISTRICT COURT UNDER RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE PROPERLY IMPOSE AN APPROXIMATELY $1,000,000.00 DEFAULT JUDGMENT UPON A DEFENDANT BECAUSE THE DEFENDANT VIOLATED A COLLATERAL INJUNCTION AND WAS FOUND TO HAVE COMMITTED PERJURY IN DISCOVERY RESPONSES THAT RELATED PRIMARILY TO THE VIOLATION OF THE INJUNCTION AND WHERE THE MISCONDUCT WAS UNRELATED TO THE ISSUES RAISED IN THE COMPLAINT?

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## OPINIONS BELOW

The judgment and panel opinion of the United States Court of Appeals for the Third Circuit dated August 31, 1987 is reproduced as Appendix A below. The Third Circuit's denial *en banc* of Petitioners' Petition for Rehearing in Banc dated September 28, 1987, is reproduced as Appendix B. The District Court's Memorandum Opinion of August 14, 1986, is reproduced as Appendix C. The District Court's Judgments of default and dismissal are reproduced as Appendices D and E.

## JURISDICTION

The judgments and decrees sought to be reviewed are the judgment of the Third Circuit dated August 31, 1987, the Memorandum Opinion of the United States District Court for the District of New Jersey dated August 14, 1986, and the Amended Order of Default and Default Judgment entered December 1, 1986 and December 3, 1986, respectively. The Third Circuit entered an order on September 28, 1987, denying petitioners' motion for rehearing *en banc*. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

## CONSTITUTIONAL & STATUTORY PROVISIONS & RULES

1. U.S. Constitution - Fifth Amendment:

   (See Appendix F)

2. U.S. Constitution - Sixth Amendment:

   (See Appendix F)

3. U.S. Constitution - Seventh Amendment:

   (See Appendix F)

4. 18 U.S.C. §1621 - Perjury generally:

   (See Appendix F)

5. Federal Rules of Civil Procedure, Rule 37(b)(2) - Failure to Make Discovery: Sanctions—

   (See Appendix F)

## STATEMENT OF THE CASE

Entre Computer Centers, Inc. ("Entre") is a national franchisor of computer stores. Anant B. and Zarina A. Goel are natives of the nation of India who moved to the United States in 1970. In November 1982 they visited Entre's headquarters in McLean, Virginia to discuss the purchase of a franchise. Relying upon Entre's promises, the Goels purchased a franchise for $30,000.00 and signed a boilerplate Franchise Agreement.

The Goels formed a corporation, Computomat, Inc., to own and to operate the Goels' store in Union, New Jersey. The store opened for business in March 1983. Anant Goel managed the Center.

On July 11, 1984, Entre commenced this action against the Goels and Computomat in the United States District Court for the Eastern District of Virginia, invoking the jurisdiction of the Court pursuant to 28 U.S.C. §1331, 28 U.S.C. §1332, and 18 U.S.C. §1964. Upon being served with the Complaint, Anant Goel hired counsel to defend himself, his wife and Computomat and to assert counterclaims against Entre for its wrongful activities, which consisted of, *inter alia,* fraudulent inducement into the franchise agreement and breach of that agreement through product shortages and product overcharges.

The Virginia court transferred the action to the United States District Court for the District of New Jersey. Meanwhile, Entre began a separate action in the New Jersey court (hereinafter "the district court") seeking identical relief. Ultimately, the two actions were consolidated. On or about October 8, 1984, counsel filed an Answer and Counterclaim.

On October 11, 1984, the district court conducted an evidentiary hearing on Entre's preliminary injunction motion which effectively sought to terminate the franchise and to enforce certain boilerplate contractual provisions including the assignment to Entre of Computomat's lease. Entre presented testimony from a number of witnesses including two of Computomat's former clerical employees, Sara Solberg and Barbara Greene. Their testimony created the impression that Anant Goel had kept two sets of books in order to cheat Entre out of royalty payments. Counsel failed to put Goel on the stand to explain that he had negotiated a dual-track accounting agreement with Entre to segregate royalties owing on sales of products purchased from Entre versus sales of products purchased from sources other than Entre even though Entre's corporate Controller described at the hearing a similar, albeit

temporary, dual-track accounting agreement Entre had established in February 1984.

The district court found that "the evidence establishes conclusively, and essentially without contradiction, that since at least mid-1983 defendants have systematically and continuously perpetrated a major fraud upon plaintiff." The court granted Entre's motion and instructed it to submit a proposed order. This marked the only occasion in the more than two years that this case was before the district court that the district court directly considered the merits of Entre's claims. The district court never directly considered the petitioners' defenses or counterclaims.

The district court signed Entre's proposed order on October 22, 1984, at a hearing attended by counsel but without the Goels. Among other things, the Order empowered Entre to physically take over the Goels' store by 10:00 a.m., October 25, 1984 and enjoined the Goels and Computomat from maintaining a certain level of interest in any computer business for a twelve-month period. On January 22, 1985, Computomat filed a Petition for protection under Chapter 11 of the Bankruptcy Code.

Over the next several months, the Goels became associated with two computer sales businesses, Corporate Micros and, later, Mirro Computers d/b/a Future Visions. The district court held a number of hearings between October and December 1984, concerning allegations by Entre that Anant Goel was in violation of the court's injunction against operating a computer business. Anant Goel testified at the hearings. On February 25, 1985, the district court issued an opinion that contained findings that Anant Goel had been "devious, deceitful and untruthful" in describing his activities during the time period of October 24 to December 27, 1984. The district court referred the

matter of Goel's testimony to the United States Attorney's Office. The district court ordered Goel and Computomat to pay Entre's attorney's fees in connection with the hearings of the previous months.

On May 3, 1985, the Magistrate issued an Order that all discovery be concluded by August 1, 1985. On May 8 and June 1, 1985, Entre's counsel propounded two sets of Interrogatories directed toward the Goels alone. During June and July the Goels received little or no assistance from counsel in answering the Interrogatories.

Entre filed a motion to compel answers on July 19, 1985. The Magistrate ordered that the Goels answer the Interrogatories by August 11, 1985, or otherwise incur substantial fines and be jailed. The Goels served Entre with answers and relevant documents on August 9, 1985. The Goels and Computomat produced virtually every single relevant document in their possession on three different occasions—October 1984; August 1985; and February 1986.

On September 30, 1985, Entre filed a motion to dismiss and to enter default judgment against all defendants based upon the Goels' supposedly deficient answers to interrogatories. The hearing on the motion was combined with the pretrial conference and ultimately scheduled for November 26, 1985. Counsel did not attempt to file a response to Entre's motion until November 22, 1985. The Goels did not learn until that date that Entre had filed the motion. The Magistrate conducted a hearing on November 26, 1985, in which she announced her intention to recommend dismissal and default judgment to the district court.

The Goels dismissed their counsel in December 1985. New counsel filed objections to the Magistrate's recommendation on December 17, 1985. On January 8, 1986, the district court declined to adopt the Magistrate's Recom-

mendations. The court gave the Goels 45 days to reanswer Entre's Interrogatories and to produce documents but refused to allow the Goels to engage in discovery. The court also directed the Goels to specify precisely what their defenses and counterclaims consisted of.

On January 21, 1986, bankruptcy counsel for Computomat obtained an Order from the Bankruptcy Court lifting the automatic stay to allow Computomat to rejoin the litigation in the district court. On February 14, 1986, the district court refused to allow Computomat to propound discovery requests. On January 29, 1986, the Goels filed their Specification of counterclaims and defenses.

On February 25, 1986, the Goels served Entre with their Answers to Interrogatories. Their answers to the first set span 56 pages and their answers to the second set span twelve pages. Additionally, the Goels provided Entre with literally thousands of documents.

On March 5, 1986, the district court held a hearing in chambers at which Entre's counsel proffered that the Goels owned Corporate Micros and Future Visions and that, hence, their answers to interrogatory numbers 14, 15 and 16 of the second set were false. The answers to the interrogatories were totally unrelated to the merits of each side's claims against one another although the interrogatories themselves ostensibly were not so limited. The court granted Entre 60 days within which to conduct discovery on that issue. At the completion of that discovery Entre renewed its motion for dismissal and default judgment based upon the Goels' alleged untruthfulness. The Goels served Supplemental Answers to Interrogatory numbers 15 and 16 of the Second Set on or about May 23, 1986. The court heard four days of testimony on the motion in May, June and July 1986.

On August 14, 1986, the district court issued an Opinion in which it concluded, among other things, that the Goels' Answers to five of the Interrogatories were false and that Goel's testimony at the most recent hearings was false. The court announced its intention to dismiss the counterclaims of *all* of the defendants and to enter default judgment against *all* of the defendants and to award Entre its attorney's fees and costs.

At a hearing on damages, the court refused to hear any evidence offered by the Goels. Further, the court rejected the Goels' request for a jury or, alternatively, to make specific findings of fact. Based upon Entre's Pretrial Memorandum, the court awarded Entre $920,855.19 plus interest. The award included costs and attorney's fees in the amount of $105,718.00. Further, the district court failed to consider fully the petitioners' evidence of set-offs and satisfaction of judgment. The court dismissed the counterclaims of all defendants and entered default judgment against all defendants on December 1, 1986.

## REASONS FOR GRANTING WRIT

### I.

### THE CIRCUIT COURTS OF APPEAL ARE NOT UNIFORMLY AND CONSISTENTLY REVIEWING SANCTIONS APPLIED UNDER RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 37(b)(2), which is set out in its entirety at Appendix F, authorizes the imposition of default judgment and dismissal as possible sanctions for failure to comply with discovery orders.

The original "Notes of Advisory Committee on Rules" to Rule 37 provides as follows:

> "The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas,* 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott,* 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt."

This Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites,* 456 U.S. 694, 709, 102 S.Ct. 2099, 2107, 72 L.Ed.2d 492 (1982), said the following about Rule 37(b)(2):

> "Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing, supra,* the former represents the general due process restrictions on the court's discretion."

The Petitioners assert that some of the Circuit Courts of Appeal—including the Third Circuit in the instant case—have failed to adhere to the teachings of this Court and to acknowledge the limitations placed upon a court's ability to impose case-deciding sanctions by the Fifth Amendment to the United States Constitution. Additionally, this Court's decisions leave open the question raised in this Petition.

### A. History of the Courts' Sanctioning Authority Under the Fifth Amendment

Since 1897, this Court has held that a lower court cannot strike a defendant's answer and enter default judgment without violating the defendant's right to due process under the Fifth Amendment where the action is taken as punishment for disobeying an order unrelated to the subject matter of the litigation. In *Hovey v. Elliott, supra,* the bill of the complainants Hovey and Dole against defendants McDonald and White consisted of an allegation of a 25% interest in monies being held by a receiver. The trial court ordered McDonald and White to deposit into the court's registry the complainants' alleged 25% interest in the monies, i.e., $49,297.50. McDonald and White failed to do so and were subse-

quently held in contempt. Citing their failure, the trial court struck their answer in which they had averred fraud and wrongdoing on the complainants' part. Their allegations, if true, would have defeated the complainants' right to recovery. The trial court entered what amounted to a default judgment. *Hovey, supra,* 167 U.S. at 409-12, 17 S.Ct. at 841-42.

Some years later, complainant Hovey commenced an action in a different jurisdiction—New York—against the receiver's surviving partners in which Hovey sought an accounting. The New York Court of Appeals refused to recognize the earlier default judgment entered against McDonald and White reasoning that the court which entered said judgment acted beyond its jurisdiction "because . . . it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause. . . ." 167 U.S. at 412, 17 S.Ct. at 843. This Court agreed holding that a defendant is denied his right to due process under the Fifth Amendment where he is punished for failing to comply with an order to deposit money into the court's registry by the striking of his answers and the entry of a decree *pro confesse.* 167 U.S. at 444, 446-47, 17 S.Ct. at 854, 855.

To this day, this Court's discussion in *Hovey* of a defendant's due process rights *vis-a-vis* a trial court's power to punish recalcitrant behavior remains the clearest exposition of those rights. Yet rarely does one find in the modern decisions a clear articulation of those rights. Nor do they seem to be considered adequately by lower courts when the severe sanctions of default judgment and/or dismissal are contemplated.

The precise question confronting this Court in *Hovey* was as follows:

> ". . . [W]hether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof, and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer."

167 U.S. at 413, 17 S.Ct. at 843. This Court commenced its due process analysis with the following queries:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department—the source and fountain of justice itself—has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the constitution."

167 U.S. at 417, 17 S.Ct. at 844.

This Court then eloquently stated precisely why the lower court had erred by entering default judgment based upon contempt matters unrelated to the merits of the litigation.

> "The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that

> a portion of the award made in favor of the defendant—in other words, his property—belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law? If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards."

167 U.S. at 418-19, 17 S.Ct. at 845.

This Court resolved a related yet ultimately fundamentally different question in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909). *Hammond* involved an action by the State of Arkansas against a foreign corporation under Arkansas' Antitrust statute. A section of that statute authorized the trial

courts of Arkansas to strike a defendant's answer where the defendant had failed to produce books, papers and documents after being ordered to produce same by the trial court during the discovery portion of litigation. The defendant, Hammond Packing Co., refused to obey such an order which resulted in the striking of its answer and entering of default judgment against it.

The Hammond Packing Co. argued to this Court that its decision in *Hovey* demonstrated the unconstitutionality of the Arkansas court's effective imposition of default judgment against it. In distinguishing *Hovey* from the facts before it, this Court described *Hovey* as involving

> ". . . a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause . . . In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering . . ."

212 U.S. at 350-51, 29 S.Ct. at 380. This Court went on to conclude that:

> "As the power to strike an answer out and enter a default, conferred by §9 of the act of 1905, which is

> before us, is clearly referable to the undoubted right of the law-making authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation."

212 U.S. at 353-54, 29 S.Ct. at 381.

The Federal Rules of Civil Procedure became effective some 30 years after *Hammond*. As noted above, the Advisory Committee took *Hammond* and *Hovey* into account in enacting Rule 37.

The first direct discussion of Rule 37 by this Court came in 1958 in *Societe Internationale, Etc. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). In *Societe*, the trial court had dismissed with prejudice the plaintiff's complaint for failing to comply fully with a pretrial production order.

> "The provisions of Rule 37 which are here involved must be read in light of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey* . . . and *Hammond* . . . The decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of this cause."

357 U.S. at 209, 78 S.Ct. at 1094. After reviewing the holdings of *Hovey* and *Hammond*, and the distinctions

between the two cases, this Court noted that *Hovey* and *Hammond* "leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order." 357 U.S. at 210, 79 S.Ct. at 1095. This Court held that dismissal and, implicitly, default judgment, were not constitutionally permissible under Rule 37 absent "willfulness, bad faith, or any fault of petitioner." [Footnote omitted]. 357 U.S. at 212, 78 S.Ct. at 1096.

In 1970, Rule 37 was amended by substituting the word "failure" for the word "refusal" to reflect this Court's other holding in *Societe* that willfulness is relevant only to the selection as opposed to the very imposition of sanctions. 357 U.S. at 208, 78 S.Ct. at 1094. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 474 (1976), this Court affirmed the dismissal with prejudice of the plaintiff's complaint under Rule 37 for untimely and grossly inadequate responses to interrogatories. 427 U.S. at 642, 96 S.Ct. at 2780.

Finally, this Court in *Insurance Corp. of Ireland, supra,* distinguished *Hovey* and *Hammond* once again. "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption." 456 U.S. at 706, 102 S.Ct. at 2106. That presumption, of course, is that it will be *presumed* that the defendant has no valid defense if he fails to produce evidence during the discovery process. If the defendant is ready, willing and able—indeed, readiness and willingness alone will suffice under this Court's "bad faith" requirement established in *Societe*—to participate in dis-

covery it is a violation of his rights to due process to enter default judgment against him.

### B. The Circuit Courts of Appeal Have Failed to Consistently Apply This Court's Views When Addressing the Issue of Rule 37 Sanctions

The Courts of Appeal have been struggling to devise consistent guidelines for the application of sanctions under Rule 37. A primary struggle has been with the application of the two most extreme sanctions available under Rule 37—default judgment and the dismissal of claims. An inconsistent patchwork quilt emerges, sometimes even within a given Circuit, when one examines those cases where default judgment or dismissal were requested.

For example, the Circuit Courts of Appeal for the District of Columbia, the Second, Fifth, Sixth and Eleventh Circuits require their district courts to specifically consider the availability of lesser sanctions. *United States for Use of M-Co Constr. v. Shipco General,* 814 F.2d 1011, 1013-14 (5th Cir., 1987); *Camp v. Oliver,* 798 F.2d 434, 438-39 (11th Cir., 1986); *Robbins v. Reagan,* 780 F.2d 37, 52 (D.C. Cir., 1985); *Patton v. Aerojet Ordnance Co.,* 765 F.2d 604, 607-08 (6th Cir., 1985); *DeCrescenzo v. Maersk Container Service Co., Inc.,* 741 F.2d 17, 18, 21 (2nd Cir., 1984). However, the Eleventh Circuit appears to differ from panel to panel. *See, e.g., Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510 (11th Cir., 1986). The same could be said for the Third Circuit. In *Poulis v. State Farm Fire & Casualty Co.,* 747 F.2d 863, 867 (3rd Cir., 1984), the Third Circuit referred to the sanction of default judgment as a sanction of last resort, and in *Scarborough v. Eubanks,* 747 F.2d 871, 875 (3rd Cir.,

1984), it stated: "Because such an order [i.e., dismissal or default judgment] deprives a party of its day in court, our precedent requires that we carefully review each such case to ascertain whether the district court abused its discretion in applying such an extreme sanction." The Third Circuit in the instant case seems to have abandoned these views. In direct contrast to the District of Columbia Circuit and the Second, Fifth, Sixth and Eleventh Circuits, the First Circuit holds that there is no requirement to first consider or apply lesser sanctions. *See, Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 15 (1st Cir., 1983).

The lower courts need guidance as to the precise parameters of protection afforded by the due process clause of the Fifth Amendment in the context of default judgments and dismissals. Further, this Court must resolve the question of whether the express consideration and application of lesser sanctions is a necessary prerequisite in the application of Rule 37 sanctions.

### C. The Petitioners' Due Process Rights Were Violated by the Imposition of Default Judgment and the Dismissal of Their Counterclaims

The analysis for determining whether the petitioners' due process rights were violated should commence with this Court's pronouncements in *Insurance Corp. of Ireland, supra*. A Rule 37(b)(2) sanction must (1) be "just"; and (2) "be specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707, 102 S.Ct. at 2107. The Third Circuit and the district court met neither requirement.

### 1. The Sanctions of Default Judgment and Dismissal of Petitioners' Counterclaims Were Unjust

The requirement that a sanction be just "represents the general due process restrictions on the [district] court's discretion." *Insurance Corp. of Ireland, supra,* 456 U.S. at 707, 102 S.Ct. at 2107. To paraphrase this Court's comments in *Hovey,* due process requires that a trial be held on the merits of a litigant's contentions.

No reason advanced by either the Third Circuit or the district court can support the default judgment entered against the Petitioners nor the dismissal of their counterclaims. *First,* the imposition of sanctions against Computomat is not even superficially warranted. It is *undisputed* that Entre's interrogatories were not even *addressed* to Computomat. At the time Entre propounded its interrogatories Computomat had sought protection under Chapter 11 of the Bankruptcy Act and, consequently, all litigation against Computomat had been stayed. Neither the Third Circuit nor the district court in its Memorandum Opinion even acknowledged these facts. It was as if Computomat, a separate and distinct entity, must suffer the same fate as the Goels simply because the Goels were its shareholders. There is no authority for the proposition that a corporate veil can be pierced *sub silentio* especially when the result is the complete emasculation of the corporation's rights under the Fifth and Seventh Amendments to the Constitution. The imposition of sanctions against Computomat was an exercise of guilt by association and nothing more.

*Second,* the behavior for which the petitioners were sanctioned was totally unrelated to the merits of Entre's

case against the petitioners and the Petitioners' counterclaims against Entre. This case can easily be divided into two phases. "Phase I" is the merits of the case, i.e., did the petitioners commit fraud upon Entre in the operation of the computer franchise, did Entre commit fraud upon the petitioners with respect to the computer franchise, did either Entre or the petitioners breach the franchise agreement during the operation of the franchise. *The franchise terminated in October 1984.* "Phase II" consists essentially of the conduct of Anant Goel and, to a far lesser degree, Zarina Goel, during the litigation of these claims from October 1984 and beyond. The events for which petitioners have been sanctioned occurred entirely in Phase II and were entirely unrelated to the merits of the case.

On January 8, 1986, the district court ordered *the Goels*—Computomat was still protected by the Bankruptcy stay—to file fully responsive answers to Entre's interrogatories and to produce all documents identified in those answers. In February 1986, the petitioners timely served their answers to Entre's 71 interrogatories and produced literally thousands of documents in connection with those answers. At the behest of a proffer by Entre, the district court held hearings to determine the truthfulness of a small number of the Goels' answers. After the hearings, the district court concluded that default judgment must be entered against all three petitioners and that all three petitioners' counterclaims must be dismissed based upon the district court's findings that the Goels violated two orders entered by the district court in October 1984, that Anant Goel attempted to suborn perjury, that the Goels' explanation of two written offers dated October 1984 for the purchase of the business was false, that Anant Goel falsely testified and that both Goels had

falsely explained in their interrogatory answers their involvement with two businesses *after* the termination of their Entre franchise and that the Goels made a mockery of the pretrial process.

Let us assume for the moment that the district court is correct in all of its findings. Default judgment and dismissal of the petitioners' counterclaims is *still* violative of the petitioners' due process rights. The situation is no different than in *Hovey* where the defendants' Answers were stricken for disobeying an order unrelated to the merits. Assuming the Goels were untruthful in their descriptions of their activities in Phase II of this case—i.e., *after* the franchise was terminated—such deception has no bearing upon their activities and the activities of Entre during Phase I, i.e., the *pendency* of the franchise.

*If* the Goels were indeed deceitful in five out of 71 interrogatory answers, they certainly must endure more than a slap on the wrist. Petitioners agree that perjury is a serious offense and in making their arguments to this Court do not suggest that they in any way wish to minimize the seriousness of such conduct. Yet there are proper ways to deal with perjury and there are improper ways to deal with perjury. It is the petitioners' view that default judgment and dismissal of their counterclaims went beyond the remedies available to the district court.

Perjury is a crime. 18 U.S.C. §1621. It is punishable by fine and/or imprisonment. *Id.* It consists of a false statement willfully made as to material facts. *United States v. Hvass*, 355 U.S. 570, 78 S.Ct. 501, 2 L.Ed.2d 496 (1958). There can be no trial absent a proper indictment. *See, e.g., Paternostro v. United States*, 311 F.2d 298 (5th Cir., 1962). As with all other federal criminal prosecutions, the Sixth Amendment to the Constitution guarantees the accused the right to a jury trial.

Perjury is a serious offense for which there are serious consequences. Because of the seriousness of the consequences the Constitution and statutes provide procedural safeguards against a hasty or emotional conclusion. Yet the petitioners in this case essentially have been tried and convicted by a judge presiding over a civil matter who then imposed punishments that are not even prescribed by statute as a punishment for perjury. In one fell swoop, the district court deprived the petitioners of their due process rights under the Fifth Amendment and their rights to a jury trial under both the Sixth *and* Seventh Amendments.

The only proper course of action available to the district court was to refer the matter of the suspected perjury to the United States Attorney which, in fact, the district court did. The impropriety of the district court taking any further action becomes painfully clear when one presumes—as one *must* presume until proved to an impartial jury beyond a reasonable doubt—that the district court was just plain wrong in its conclusion that the Goels had committed perjury. That the district court believed Anant Goel to be a scoundrel is beyond dispute. In the final analysis, however, the district court's opinion of Anant Goel is immaterial to the fact of whether both Goels violated a federal criminal statute. Indeed, for what purpose did the district court even bother to refer the matter to the United States Attorney unless the district court assumed, *as it had to assume*, that the possibility existed that a properly instructed jury after a proper trial and proper indictment might find the Goels not guilty of perjury? If the district court's conclusions are incorrect—which petitioners assert they are—then the petitioners have suffered the travesty of a nearly

$1,000,000.00 default judgment and dismissal of valid counterclaims *for absolutely no reason.* Clearly, it was outside the district court's authority to be making fact findings of perjury and assessing penalties willy-nilly.

Even *if* it was proper for the district court to find that the Goels had committed perjury and even if the Goels had violated orders unrelated to the merits of the numerous claims by all parties, the fact remains that the district court was confronted with a contempt situation but no more. Appropriate measures are available for litigants held in contempt. The appropriate measures, however, do not include default judgment nor, by logical implication, dismissal of counterclaims as this Court made clear nearly 100 years ago in *Hovey.*

### 2. The Sanctions Imposed Upon the Petitioners Were Unrelated to the Claims Involved

The second standard which must be met in order to sustain sanctions under Rule 37 is that the sanction must be particularly related to the particular claim which was at issue in the order to provide discovery. This requirement "reflects the rule of *Hammond Packing,*" *Insurance Corp. of Ireland, supra,* 456 U.S. at 707, 102 S.Ct. at 2107, that rule, of course, being "the presumption that the refusal to produce evidence . . . [is] but an admission of the want of merit in the asserted defense." *Hammond Packing,* 212 U.S. at 351, 29 S.Ct. at 380. Inherent in this requirement is the duty of a court to consider whether there exist adequate sanctions that are less severe than default judgment or dismissal. *See, e.g., United States for Use of M-Co Constr. v. Shipco General, supra; Camp v. Oliver, supra; Robbins v. Reagan,*

*supra; Patton v. Aerojet Ordnance Co., supra; DeCrescenzo v. Maersk Container Service Co., Inc., supra; In Re Agent Orange Product Liability Litigation,* 611 F.Supp. 1290 (E.D.N.Y. 1985); *Valdan Sportswear v. Montgomery Ward & Co.,* 591 F.Supp. 1188 (S.D.N.Y. 1984).

Even if default judgment and dismissal were not precluded as sanctions by the Fifth Amendment, the fact remains that those sanctions are not related to the contested issues nor are they the least drastic of the adequate sanctions available. As discussed above, none of the actions of the petitioners for which they were sanctioned bore any relation to the merits of the case. That fact in and of itself precludes any reliance upon sanctions which destroy any possibility of resolving the merits of the underlying claims.

For example, the uproar over all five of the disputed interrogatories involved the Goels' activities during Phase II, i.e., after the termination of their franchise and the court-ordered loss of their business to Entre. Whether or not the Goels lied in their interrogatory answers does not change one iota the merits of their defenses to Entre's allegations concerning the operation of the franchise or the petitioners' claims against Entre. There is absolutely no correlation.

Not only is there no correlation but there were far less drastic sanctions available to the district court which would have satisfied the district court's concerns and which petitioners specifically suggested to the district court and to the Third Circuit. For example, the district court could have and in fact did award Entre $105,718.00 in attorneys' fees. That sanction alone arguably would have sufficed.

Petitioners additionally suggested a preclusion order. For example, the district court could have precluded the Goels at trial from offering any evidence tending to show that they did not own interests in Corporate Micros or Future Visions which was the subject matter of three of Entre's interrogatories. Similarly, with respect to the other two interrogatories, the district court could have precluded the Goels from contesting any interest in the bank accounts of the two businesses in which they were accused of having interests[1] and could have precluded the Goels from advancing their explanation of the significance of the two written offers which such explanation the district court had chosen to disbelieve. Further, the district court at trial could have subjected the Goels to unusually intense cross-examination.

Assuming again that the district court was correct in finding that five of the 71 interrogatory answers were false, the fact remains that the district court's imposition of the ultimate sanctions of default judgment and dismissal were inappropriate and far too severe—especially considering the fact that the interrogatories in dispute had virtually nothing to do with the merits of the litigants' respective claims. Clearly, a tailored preclusion order would have been the most appropriate sanction, especially in light of the fact that the district court awarded Entre $105,718.00 in attorneys' fees.

The presumption from *Hammond Packing* is that if a litigant vexatiously refuses to produce requested evidence, it is presumed that that evidence is harmful to

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1. The interests which the Goels were alleged to have did not come into existence until Phase II of this litigation.

him. That is not an issue here.[2] *Hovey* governs here; not *Hammond Packing*. Petitioners beseeched not only the district court but the Third Circuit as well to read the Goels' answers to all 71 interrogatories in order to place into perspective the relative insignificance of the five disputed interrogatories and, more importantly, to see that the Goels, with new counsel, were ready, willing and able to litigate fully the merits of each side's claims.

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2. It was an issue when the petitioners were represented by their first counsel. However, at the January 8, 1986 hearing, the district court granted the Goels the opportunity to reanswer the interrogatories "because their attorneys have exhibited both the intent and the ability to pursue this matter diligently and effectively." [A11]. Once the Goels reanswered the interrogatories and produced thousands of documents, the issue became the Goels' veracity; the refusal to produce evidence—which is the very foundation of the *Hammond Packing* presumption—was not an issue.

## CONCLUSION

For the reasons stated herein, petitioners beseech this Court to grant their Writ of Certiorari and to reverse and remand this action with instructions to the Third Circuit to order the district court to vacate its orders of dismissal and of default judgment.

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# APPENDIX A

(Filed August 31, 1986)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 86-5900

---

ENTRE COMPUTER CENTERS, INC.,
A Delaware Corporation,

v.

ANANT B. GOEL, ZARINA A. GOEL AND
COMPUTOMAT, INC., A New Jersey
Corporation,
*Appellants.*

---

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

---

Before: GIBBONS, *Chief Judge,* WEIS, *Circuit Judge,* and KELLY, *District Judge.*

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## JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit Rule 12(6) on August 20, 1987.

On consideration whereof, it is now ordered and adjudged by this Court that the judgments of the District Court entered December 2 and 3, 1986 be and the same are hereby affirmed.

Costs taxed against appellants.

ATTEST:

/s/ (Illegible)
Clerk

Date: August 31, 1987

Costs taxed in favor of the appellee Entre Computer Centers as follows:

Brief ..... $369.94

Certified as a true copy and issue in lieu of a formal mandate on October 6, 1987

Test:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

*NOT FOR PUBLICATION*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 86-5900

---

ENTRE COMPUTER CENTERS, INC.,
A Delaware Corporation,

v.

ANANT B. GOEL, ZARINA A. GOEL AND
AND COMPUTOMAT, INC., A New Jersey
Corporation,
*Appellants.*

---

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 84-2699)
District Judge: Honorable Dickinson R. Debevoise

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Submitted Pursuant To Third Circuit Rule 12(6)
August 20, 1987

Before: GIBBONS, *Chief Judge,* WEIS, *Circuit Judge,* and KELLY,* *District Judge.*

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**MEMORANDUM OPINION OF THE COURT**

(August 31, 1987)

WEIS, *Circuit Judge.*

The district court entered a default judgment in favor of plaintiff as a sanction for the defendants' violation of

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*The Honorable James M. Kelly, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Federal Rules of Civil Procedure 33 and 34. Federal Rule of Civil Procedure 37(b)(2)(C) provides, as one of the possible penalties for failure to carry out discovery, that a court may render a judgment by default against the noncomplying party. This is a drastic sanction that should be imposed only in the event of egregious conduct and after consideration of lesser modes of punishment.

In the case at hand, the behavior of defendants was so flagrant and inexcusable that default was not only justified but indeed mandated. The district judge, in a detailed and comprehensive opinion, painstakingly reviewed the defendants' repeated evasions of their obligations in the conduct of litigation and their outright perjury on certain occasions.

Indeed, the proceeding at which the default was imposed was the second time the court had been confronted with the defendants' misconduct. After the first hearing, the court characterized defendant Anant Goel as "devious, deceitful, and untruthful" during the proceedings and referred the matter to the United States Attorney for investigation of possible perjury charges.

Despite this strong action, defendants did not alter their conduct and persisted in similar outrageous defiance of the court and its orders. For the reasons stated in the district court's opinion, we will affirm the entry of the default judgment.

Defendants complain that they were denied the right to a jury trial on the amount of damages. Whether they were entitled to a jury in the circumstances here is uncertain. *See Hutton v. Fisher,* 359 F.2d 913 (3d Cir. 1966); *but see Eisler v. Stritzler,* 535 F.2d 148 (1st Cir. 1976); *Henry v. Sneiders,* 490 F.2d 315 (9th Cir. 1974). How-

ever, in view of the trial judge's rulings on the damage evidence, we need not resolve the issue here.

Plaintiff sought damages consisting of royalties computed on the sales made by defendants, less certain credits for which the court allowed credit. The district judge accepted the figures on sales as presented by defendants and ruled as a matter of law that, because of the fraud and contractual breach, defendants were not entitled to a credit for the value of their business. In addition, defendants contended that certain overcharges should have been deducted. The overcharges as well as the value of the business had been included in the counterclaim filed by defendants; however, that counterclaim had been foreclosed by the entry of default judgment in favor of plaintiffs.

The district court accordingly concluded that no issue of fact existed on the damage question, and therefore nothing remained for the jury to decide. As the court remarked, "there's nothing left to litigate." We conclude that in the circumstances here the district judge properly refused to seat a jury because there were no disputed issues of fact to be resolved.

Finding no reversible error in the computation of damages or in the failure to seat a jury and no abuse of discretion in entering a default judgment, we will affirm the judgment of the district court.

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TO THE CLERK:

Please file the foregoing opinion.

/s/ Weis
Circuit Judge

## APPENDIX B

(Filed September 28, 1987)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 86-5900

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ENTRE COMPUTER CENTERS, INC.,
Plaintiff-Appellee,

v.

ANANT B. GOEL, ZARINA A. GOEL, and
COMPUTOMAT, INC.,
Defendants-Appellants.
(D.C. Civ. No. 84-2699)

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**SUR PETITION FOR REHEARING**

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG SCIRICA, *Circuit Judges*, and KELLY, *District Judge*.*

The petition for rehearing filed by defendants-appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit

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*The Honorable James M. Kelly, United States District Judge for the Eastern District of Pennsylvania, who sat by designation, may vote for panel rehearing only.

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Weis
Circuit Judge

DATED: SEPTEMBER 28, 1987

## APPENDIX C

(Filed August 14, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Civil No. 84-2699

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ENTRE COMPUTER CENTERS, INC.,
Plaintiff,

v.

ANANT B. GOEL, et al.,
Defendants.

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**TRANSCRIPT OF PROCEEDINGS**
**OPINION**

Newark, New Jersey
August 14, 1986

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

Appearances:

SAIBER, SCHLESINGER, SATZ & GOLDSTEIN, ESQS.,
BY: ROBIN HORN, ESQ.,

SCHMELTZER, APTAKER & SHEPPARD, ESQ., (DC)
BY: STEVEN HORN, ESQ.,
ROBERT L. ZISK, ESQ.,

PITNEY, HARDIN, KIPP & SZUCH, ESQS.,
BY: DENNIS T. KEARNEY, ESQ.,

For the Plaintiff

STRYKER, TAMS & DILL, ESQS.,
BY: BURTIS W. HOERNER, ESQ.,
EDWARD A. MC CONWELL, ESQ., (KS)
CLAYTON E. DICKEY, ESQ.,
For the Defendants

Pursuant to Section 753 Title 28 United States Code, the following Transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

Howard A. Rappaport
Official Court Reporter

[2] I. *Introduction*

Plaintiff, Entre Computer Centers, Inc. ("Entre") filed this lawsuit on July 10, 1984 in the United States District Court for the Eastern District of Virginia, naming as defendants, Entre's franchisee Anant B. Goel ("Goel"), Goel's wife Zarina A. Goel, and Goel's corporation Computomat, Inc. ("Computomat"). The action was subsequently transferred to the District of New Jersey.

The complaint contains counts alleging fraud, breach of contract and unfair competition. Defendants answered and asserted a counterclaim alleging breach of contract, fraud, wrongful termination of a franchise, antitrust violations and RICO violations.

The present motion is but the latest in a series of extraordinary proceedings which have marked the progress of this case. The earlier proceedings will be described below. The present motions has its origins in a discovery dispute.

On May 6 and May 28, 1985, Entre, pursuant to a discovery schedule established by the Court, served two sets of interrogatories and requests for production of documents upon all defendants.

The defendants did not file responses to Entre's interrogatories and requests for production of documents. On July 19, 1985, Entre filed a motion to compel discovery.

On July 29, 1985, Magistrate Perretti entered an order [3] requiring the defendants to fully comply with all outstanding interrogatories and requests for production by August 2, 1985. The Magistrate also provided for a series of fines to be levied for each day the defendants failed to comply from August 3 to August 8, 1985, and provided that Entre might move for defendants' arrest should they fail to comply with the order by August 8.

Entre did not receive the required discovery responses from the defendant until August 9, 1985. Based on the alleged inadequacies in the answers that were received, and on the defendants' failure to participate in the preparation of the final pretrial stipulation or to otherwise prepare for the pretrial conference as ordered by the Magistrate, Entre filed a motion to dismiss and to grant default judgment pursuant to Fed. R. Civ. P. 37(d).

On December 2, 1985, Magistrate Perretti issued a report and recommendation that the Court enter an order granting a default judgment in favor of Entre on its claims against defendants and dismissing defendants' counterclaims with prejudice.

The Magistrate's recommendation was based on defendants' failure to comply with Entre's discovery demands despite the Magistrate's orders that they do so, as well as on the totally inadequate responses to inter-

rogatories that were finally filed by defendants in an effort "to stave off their [4] arrest. . ." Transcript, November 26, 1985, page 26. In accordance with the standards articulated by the United States Court of Appeals for the Third Circuit, the Magistrate also considered the prior events in this case to the extent that they were then known in order to make the required findings of fact.

On January 8, 1986, in a bench opinion, I conditionally rejected the Magistrate's recommendations, but stated:

> There is no doubt in my mind that on the basis of the record before her, the recommendations of the Magistrate were the proper ones. I reject completely the contention of Goel's new attorneys that the original interrogatory answers were not deficient. They clearly were deficient, and if any proof of that fact were needed it lies in the necessity to submit a 34 page supplement thereto. Even with the supplement, however, they are grievously deficient.

Transcript, January 8, 1986, page 12. In light of "the prior history of continuing perjury on Anant B. Goel's part," I viewed with "considerable skepticism" the "story" set forth for the first time in defendants' supplemental answers.

Nevertheless, I decided to give defendants "one final opportunity because their attorneys have exhibited both the intent and the ability to pursue this matter diligently and effectively." This final opportunity was expressly conditioned on defendants' satisfactory completion of certain undertakings; in particular, defendants were ordered to file "fully responsive answers" to the first and second

sets of interrogatories that had been served by Entre and to produce all documents identified [5] in those answers. Defendants were ordered to "cure the defects" in their interrogatory answers.

On January 24, 1986, an order was entered in accordance with my bench opinion.

In February 1986, defendants served new answers to Entre's interrogatories and produced documents in connection with those answers. On March 5, 1986, Entre made a proffer to the Court that these newest answers contained demonstrable perjury. The particular answers that Entre alleged to be perjurious were those in interrogatory numbers 14, 15 and 16 of the second set in which Entre sought to determine:

> 14. From March 1, 1983 to present, did Anant B. Goel, as an individual, sell any computer hardware, software or related products or purchase same for the purpose of resale? If yes, identify each such transaction by date, purchaser, seller, item sold, amount of sale, and any documents concerning the sale.
>
> 15. From March 1, 1983 to present did an entity other that Computomat, in which Anant B. Goel had an interest as shareholder, partner, joint venturer, sole proprietor or otherwise, sell any computer hardware, software, or related products, or purchase same for the purpose of resale? If the answer is yes, identify each such entity and identify each such transaction by date, purchaser, seller, item sold, amount of sale, and any documents concerning the sale.
>
> 16. Identify each corporation, partnership, sole proprietorship, joint venture, or other business entity, active or inactive, in which you had an interest at any

time during the period March 1, 1983 to present. For each such entity, state:

a. Whether the proceeds of the sale of any computer hardware, software, or related products were deposited into a bank account [6] under the name of that entity.

b. Whether a check representing the proceeds of the sale of any computer hardware, software or related products was made out to that entity, regardless of whether it was ultimately deposited in the bank account in the name of that entity.

In response to numbers 14 and 15, the defendants simply stated "No."

In response to number 16, the defendants stated:

> Neither A.B. Goel or Zarina Goel held any interest in any corporation (other than Computomat), partnership, sole proprietorship, joint venture or other business entity which engaged in the sale or purchase of computer hardware, software or related products. In one instance, a cashier's check intended for Computomat erroneously was made out to Energy Management Services, a management consulting firm owned by A.B. Goel. The full amount of the check was transferred into the Computomat account as soon as the funds cleared.

At Entre's request, I granted it 60 days - until May 5 - within which to conduct discovery aimed at determining the extent to which defendants' answers were perjurious.

At the completion of discovery, Entre renewed its motion to dismiss and default, and evidentiary hearings on that motion were scheduled to begin on May 27, 1986.

On May 23, 1986, after discovery had been completed and one business day before the start of the hearings, defendants filed amended answers to interrogatory numbers 15 and 16 of the second set of interrogatories served by Entre. This was the [7] third time defendants purported to answer these particular interrogatories.

In full, their answers to number 15 was, "No, although the Goels have been associated with two entities that sold computer products."

In answer to number 16, they again swore that they held no interest in any entity other than Computomat that engaged in the sale or purchase of computer hardware, software or related products, but stated that they "have been associated with two such entities." The defendants then set forth a version of their involvement in two entities which will be discussed below, namely, Corporate Micros and Future Vision.

Although not included in Entre's proffer on March 5, at least two other interrogatory answers become significant in light of the evidence presented at the recent hearings.

Defendants' answers to interrogatory number 19 of the first set purported to describe "offers" to purchase Computomat. The documents containing the purported offers were turned over in response to a request to produce documents.

Additionally, in interrogatory two of the second set, defendants were asked to identify "each and every bank account in which you had an interest, direct or otherwise, from January 1, 1983 to present."

The hearing on Entre's renewed motion commenced on May 27, 1986 and resumed on June 26. Six witnesses

testified about [8] defendants' activities and numerous documents were admitted in evidence. The evidence establishes beyond any doubt that defendants' answers to interrogatories 2, 14, 15, 16 and 19 were false, that the supplemental answers filed on May 23 were false, constituting an attempt on defendants' part to counter the damning information they believed Entre had discovered, and that in an attempt to conceal the falseness of his answers Goel suborned perjury and committed perjury himself during the course of the hearing on Entre's motion. In light of the entire history of this case only the severest civil sanctions available to the Court would be appropriate. For the reasons hereinafter set forth, Entre's motion will be granted and an order will be entered striking defendants' answer and granting judgment by default for Entre, dismissing defendants' counterclaim and awarding to Entre its attorney's fees and costs incurred in connection with this investigation to dispute the defendants' February 1986 answers to interrogatories and in connection with its preparation for and prosecution of its present application for sanctions.

This is a drastic remedy, and consequently I shall explain the reasons for it in some detail.

## II. *Findings of Fact*

It will be recalled that Entre filed the complaint in this action on July 10, 1984 and that thereafter the action was transferred to this district.

[9] On September 19, 1984, Entre sought a preliminary injunction effectively terminating defendants' franchise and enforcing certain contractual obligations upon termination.

On October 11, 1984, after an evidentiary hearing, I found that the "[t]he evidence establishes conclusively, and essentially without contradiction, that since at least mid-1983 defendants have systematically and continuously perpetrated a major fraud upon plaintiff. Stripped to its essentials this fraud consisted of the maintenance of a double set of reporting and accounting records designed to conceal from plaintiff the full amount of sales effected by defendants and thus avoid paying 8 percent franchise fee and the 1 percent advertising fund assessment." (Opinion, page 4). Accordingly, the motion was granted and Entre was instructed to submit a proposed order.

Sometime during the period of October 11 to October 25, 1984, Goel ordered Sir Speedy printers in Union, New Jersey, owned by Chandrakant P. Barai, to print a new series of invoices for selling computer hardware and software bearing the company name "Corporate Micros." Barai testimony, transcript 20 to 21. It took Barai about two weeks to do the printing job for Goel. *Id.* at 21.

On October 22, 1984, I entered an order enjoining the defendants, for a period of one year, directly or indirectly, for themselves or through, on behalf of, or in conjunction with any person, persons, partnership or corporation from owning, [10] maintaining, engaging in, or having any interest in any business specializing in whole or in part in the sale of computer hardware, software or related products and services (a) within the standard metropolitan statistical area in which the Entre Computer Center that they operated was located; or (b) within a radius of 25 miles of the center they operated; or C, within a radius of 25 miles of any other business using

the Entre Computer Center system. The injunction also specified that Entre had notified defendants of election to purchase the defendants' inventory, and directed that a joint inventory be conducted at the time of transfer of possession of the premises.

On October 24, in the evening, acting with the knowledge of and contrary to the injunction, the defendants Anant Goel and Computomat, the corporation through which the Goels had operated their Entre franchise, caused two truckloads of inventory and equipment to be removed from the premises and taken to a warehouse in Wyckoff, New Jersey. The Wyckoff premises were leased and used by Robert and Gail Utter, who had several corporations that they operated from that location. Utter testimony, transcript 126 to 30.

The Utters, through their corporations, had conducted business with the Goels when they were Entre franchisees. Utter testimony, transcript 124 to 28; Goel testimony. Transcript 443 to 52. The use of their premises by defendants was arranged by Goel's attorney, John Carbone, who had also acted as an attorney [11] for Robert Utter. Utter testimony, transcript 126 to 30, Goel testimony, transcript 228 to 30.

On October 25, 1984, after learning of the aforementioned patent breach of the injunction, I issued a bench order requiring the defendants to hold all material stored at the Wyckoff warehouse so that a joint inventory could be performed by the parties and a report made to me for that further action. In Goel's presence, his counsel assured the Court that the order would be obeyed. Opinion, February 25, 1985, page 4.

On the afternoon and evening of October 25, 1984, and again on the afternoon of October 26, 1984, with the

knowledge, participation and consent of Goel and Computomat, inventory stored at the Wyckoff warehouse was transferred to three nonparty business entities. I found these movements of inventory to be in contempt of my orders. Opinion, February 25, 1985, pages 5 to 6.

Goel has testified on three separate occasions regarding these transfers. His testimony, offered to establish that he was coerced by circumstances to disobey the court order, was refined each time to cope with contradicting evidence. The evidence compels the conclusion that the transfer was accomplished with Goel's cooperation, if not instigation. And that Goel's explanations were perjurious.

Sometime after vacating the Entre franchise in Union, [12] Goel separately approached Barai and one Aron Scharf and requested each to submit a written "offer" to purchase his former Entre franchise. Goel told Barai that the offer would not be genuine, and that it would just be a document that Goel needed "for court." The so-called "offers" of Barai and Scharf were worded almost identically. Neither man had sufficient capital to cover the accompanying check that supposedly represented a good faith "deposit" on the offer. Barai testimony, transcript 16 to 18; Scharf testimony, transcript 308 to 12.

The evidence establishes that the offers were either prepared or dictated by Goel and backdated to October 22, 1984. Exhibits P-2 and 3. Neither offer was made in good faith or with an intention of purchasing the franchised business.

These fabricated offers were referenced in answer to interrogatory number 19 the first set of interrogatories served on defendants by Entre. They were also served

upon plaintiffs as Exhibits 190 and 196 in response to a request for production of documents. They were purported evidence of the diminution of the value of the defendants' business that had been caused by Entre's actions, a material fact in this litigation. Their reference and production constitutes perjury, as does Goel's untruthful testimony about them at the hearings.

On or about October 30 or 31, 1984, Anant and Zarina Goel met with Robert and Gail Utter to discuss the formation of [13] a new business to engage in the buying and selling of computer hardware. They agreed to a plan whereby Robert Utter would operate the business while the Goels would remain behind-the-scenes partners. Utter was to invest $25,000 in the business; the Goels were to provide the inventory, credit lines, client base and suppliers. Profits were to be split on a 50-50 basis. Utter testimony, transcript 134 to 35.

Of particular attraction to Utter was Goel's ability to obtain IBM AT computers from IBM at a time when they were a scarce commodity. Utter testimony, transcript 144 to 45.

The name proposed by Goel for the business was "Corporate Micros." That name had been conceived by Goel and, at his direction, its availability had already been researched. As mentioned above, invoices in that name were already on order. Goel and Utter decided to have Carbone, who had represented both of them, incorporate the business. Utter testimony, transcript 134 to 35; Goel testimony, transcript 244.

On October 31, 1984, Goel and Utter visited Carbone at his office. This is further evidence of Carbone's availability to and collaboration with Goal. The Corporate

Micros venture was discussed. Carbone agreed to take steps to incorporate Corporate Micros. After the meeting, Goel and Utter went directly to the Lincoln Avenue Branch of Valley National Bank in Fair Lawn, New Jersey, to open bank accounts for the new corporation. As they did not yet have a corporate seal and [14] federal tax identification number, Carbone or someone in his office arranged with the bank manager, Robert Barbarino to permit the accounts to be opened without those items. Utter testimony, transcript 136 to 37, Goel testimony, transcript 441 to 43.

One account was a checking account opened with a $50 cash deposit provided by Goel. The other was a money market account, into which Utter deposited $25,000. Utter testimony, transcript 138; Exhibit P-23.

Anant Goel's name and signature appear on the signature cards for the accounts. Goel's and Utter's were the only two authorized signatures on each account. Utter testimony, transcript, 137, Exhibit P-23.

Subsequently, $400,000 was placed into a personal accounts in the name of Gail Utter at the same bank. This money was intended to allow Corporate Micros to cover payment for any large shipments of inventory without delay. Utter testimony, transcript 138.

On November 1, Utter went to Florida and he remained there until November 10 or 11. Utter testimony, transcript 140-142, Goel testimony, transcript 250.

On November 2, while Utter was away, two deposits were made into the Corporate Micros accounts, one in the amount of $85,000 and one in the amount of $40,000. The deposit slips, made out in the handwriting of Zarina Goel, show that these [15] deposits were the proceeds of sales

made to businesses that had been customers of the Goels' Entre franchise. Utter testimony, transcript 140 to 41, Exhibit P-24. As discussed below, the same customers would later follow the Goels to their subsequent business locations.

On November 5, Goel wrote a check on the Corporate Mirocs account to pay the rents of the Wyckoff premises. Goel testimony, transcript 251, Exhibit P-25.

On November 7, 1984, one week after the formation of Corporate Micros and the opening of the bank accounts, a hearing was held to determine whether the defendants had complied with the injunction and the bench order. At that time Goel claimed to be unfamiliar with Corporate Micros. He could not name any of its principals or any person connected with it. He claimed not to know the location of its offices, but "assumed" that they were someplace in New Jersey. However, he did say that he hoped to obtain employment with them. November 7, 1984 transcript, pages 39 to 42.

On December 26, 1984, Goel testified that he had not gotten the Corporate Micros "job." December 26, 1984 transcript, page 14. He also testified that he did not know that Robert Utter was a principal of Corporate Micros until three days after the November 7 hearing. Most recently, Goel contradicted this statement when he attempted to explain his November 7 testimony as caused by the uncertainties of the [16] incorporation process. Goel testimony, transcript 443 to 45. All of these statements are in turn contradicted by Goel's deposition testimony of April 17, 1986, in which he stated that as far as he was concerned, as of the time he left Carbone's office on October 31, 1984, "Corporate Micros was Bob Utter's business." Goel deposition, page 24.

Upon Utter's return from Florida, on November 10 or 11, 1984, a meeting was held at the Wyckoff premises. Anant and Zarina Goel, Robert and Gail Utter, Peter DeBaun, David Bombard and another employee were present. At this meeting, the details of the Corporate Micros plan, including the division of ownership, were explained to employees David Bombard and Peter DeBaun. Utter testimony, transcript 142 to 45.

Zarina Goel's handwritten records of Corporate Micros sales show numerous sales made by "AB" from October 31 to November 21, 1984 - during the time that he testified to his ignorance of the Corporate Micros operation. Utter testimony, transcript 158, Exhibit P-32. Many of the customers listed on those records were customers of Computomat and later became customers of Miro Computers as well. DeBaun testimony, transcript 266. Corporate Micros invoices also indicate that Goel made sales for the corporation during November; his initials appear on the invoices. Exhibit P-27.

Peter DeBaun, an employee of the Goels from the time they were Entre franchisees to this day, called as a witness by [17] defendants, testified that Goel continued to make sales and negotiate business deals from the Wyckoff location just as he had done when the operation was in Union. DeBaun testimony, transcript 216.

DeBaun continued to receive his salary from Computomat while working for Corporate Micros as did David Bombard and Joe LaShure, two other Computomat employees who also worked for Corporate Micros. These employees looked to Goel as their employer, even though Utter was "set up" as boss of the operation. DeBaun testimony, transcript 209 to 10.

At the hearing on November 7, 1984, at the time Corporate Micros was in operation, Goel testified that the employees of Computomat - Bombard, DeBaun and La-Shure - went to work each day at 681 Lawlands [sic] Road "to work for Computomat, who is not selling." November 7, 1984, transcript 42. This testimony was contradicted by evidence available at the time and most recently, by the above-referenced direct testimony of DeBaun and records kept by Zarina Goel. Goel's testimony was patently false and was intended to conceal defendants' activities in violation of the injunction.

During November, "trailer loads" of IBM equipment arrived at the Wyckoff premises. The equipment was shipped from MicroAge corporate headquarters in Arizona to "MicroAge" at 681 Lawlins Road. There was no MicroAge store located at 681 Lawlins Road. Utter testimony, transcript 132 to 33.

[18] While operating out of the Wyckoff warehouse and offices, some sales made by the defendants were recorded on MicroAge invoices. DeBaun testimony, transcript 213. This was done to conceal the fact that Goel was engaged in business. DeBaun testimony, transcript 222 to 23. MicroAge had been a principal supplier of Computomat and would eventually become the principal supplier of Miro Computers.

Aron Scharf, who owned the MicroAge franchise that supplied the Corporate Micros with equipment, was called by the defendants. On cross-examination he admitted that he never dealt with the Utters at Corporate Micros, only with Goel and his employees. Scharf testimony, transcript 314 to 16. When asked whether he considered Corporate Micros to be a "front" for Goel, Scharf replied,

"You can call it that if you want to." Scharf testimony, transcript 313.

During the period of October 31 to November 27, 1984, Goel actively engaged in the conduct of Corporate Micros, which was a business specializing in whole or in part in the sale of computer hardware, software, or related products and services as specifically prohibited by the order of October 22, 1984. Zarina Goel participated fully by maintaining the books and records. The Goels maintained at least a 50 percent interest if not 100 percent interest in Corporate Micros, although the business was never formally incorporated.

On or about November 27, 1984, Goel was locked out of [19] the Wyckoff location by Utter, who was frustrated in his attempt to arrange the planned transfer of management from the Goels to himself. Utter testimony, transcript 148 to 50; Goel testimony, transcript 255 to 58. On or about that same date, Goel and Computomat entered into a lease for the premises at 262 Route 46 East, Fairfield, New Jersey. The premises were not to be ready for occupancy until early 1985. Goel testimony, transcript 402 to 04.

After the breakup of Corporate Micros, defendants' activities continued unabated. The entire operation - employees, inventory, suppliers and customers - was moved to premises leased by Goel to at 376 Hollywood Avenue in Fairfield.

While at that location, the Goels continued to conduct business utilizing MicroAge as a front. Their employees continued to be paid with Computomat checks made out by the Goels; sales were made to the same customers, MicroAge invoices were used; and Goel was still con-

sidered to be the boss, although the employees "disavowe[d] any knowledge of A.B. Goel" when anyone asked for him. DeBaun testimony, transcript 219 to 20.

On December 26, 1984, while he was operating on Hollywood Avenue, Goel testified that he had leased that office specifically so that Computomat's creditors would be able to reach him to collect the moneys they were owed by Computomat, and so that Computomat had a place of business from which it [20] could collect its accounts receivables. December 26, 1984, transcript 23, 25, 26. Goel's testimony was perjurious and intended to conceal the promotion and maintenance of his business interests.

In December 1984 or early January 1985, at or about the time of the December 26 to 27 hearings to determine whether Goel was surreptitiously violating court orders, Goel approached Barai, who had previously expressed a desire to enter into the computer business, and suggested that Barai form a corporation called Miro Computers, Inc. Barai testimony, transcript 22 to 23. Goel stated that he could not do it himself because he was involved in certain legal problems. Barai testimony, transcript 23.

Pursuant to Goel's instructions, Barai went to an attorney who formed the corporation and registered the name. The certificate of incorporation was actually filed on January 25, 1985. Exhibit P-5. When Barai received the corporate kit consisting of stock certificates and a seal, he turned it over to Goel as instructed. Barai testimony, transcript 24 to 25. Goel noted that the corporate name was misspelled "Mirro," it was supposed to have been "Miro," but stated that he had reasons to leave it as it was. Barai testimony, transcript 25.

Goel subsequently explained to Barai how Mirro, doing business as "Future Visions Computer Store," would be organized and operated. Goel was to provide the site, finances, [21] customers, employees, vendors, suppliers and the experience in computer selling. Barai was to learn and operate the business, and eventually would receive an ownership interest of 49 percent. Barai testimony, transcript 30 to 32.

As explained by Goel, Michael DiSabello would transfer his authorized IBM dealership from his Future Visions store in Stonybrook, Long Island to the Goels in New Jersey. Barai testimony, transcript 26 to 28, 30. In order to accomplish this, DiSabello would appear "on paper" to own 51 percent of the new business while Barai would own 49 percent. In reality, Goel would own the 51 percent interest. Goel stated that DiSabello would be paid $2,000 a month for five years for conveying the dealership to them. Barai testimony, transcript 30 to 32.

On January 28, 1985, Goel and Barai opened a bank account for Mirro Computers, Inc. at Citizens National Bank in Fairfield. The first signature card lists Barai as president and Zarina Goel as treasurer. Barai testimony, transcript 32 to 33, Exhibit P-6. The initial deposit was $38,528.05, and in the last three days of January, $62,777 was deposited, none of which was provided by Barai. Barai testimony transcript 34. On Goel's instructions, Barai also opened a money market account for Mirro at the Maplewood branch of Howard Savings and Loan. The initial deposit of $170,000 was drawn on Mirro's account at Citizens National. Barai testimony, transcript 34 to 35; Exhibit P-10.

[22] The Future Visions store in Fairfield immediately did business and earned money without the neces-

sity of "start up" capital. The bank records establish that the initial deposits were composed of neither investments nor loans, but of the proceeds of sales. These sales were made to the same customers who had purchased from the Goels as Entre franchisees (Computomat), Corporate Micros and Hollywood Avenue. Barai testimony, transcript 28 to 29; Exhibit P-9.

Goel, Zari and DiSabello each testified that he had never invested any money in the Fairfield Future Visions Store. Barai testimony, transcript 26, 30 and 42; DiSabello testimony, transcript 367; Goel testimony, transcript 416 to 21.

On February 15, 1985, more than two weeks after Future Visions began business at the 262 Route 46 East location in Fairfield, the lease for the premises was transferred from defendant Computomat, Inc. to Mirro. The lease was signed by Barai as Mirro's president. Under a separate document Goel individually guaranteed payment of the rent. Bari testimony, transcript 37; Goel testimony, transcript 402 to 04; Exhibit P-12. Goel also executed applications for a certificate of occupancy and for a sewer use permit on behalf of Mirro. Goel testimony, transcript 463 to 65; Exhibit P-38.

On February 25, 1985, I issued an opinion that contained, in part, factual findings that Goel had been "devious, deceitful and untruthful" in describing his activities [23] during the time period of October 24 to December 27, 1984. I found that on three occasions Goel had deliberately transferred or caused to be transferred inventory in direct violation of written and bench orders. Concerning these inventory movements, I found that the "limited evidence before the Court [was] strongly suggestive of conduct constituting a continuous grievous vio-

lation of the October 22, 1984 order prohibiting defendants from engaging in the business and sale of computer products in the designated areas." I also found that the seriousness of the violation, and the continuous and wilful nature of the perjury committed during the aforementioned hearings required referral to the United States Attorney's office for full investigation and appropriate action.

Goel and Computomat were held in civil contempt and ordered to pay attorney's fees and costs incurred in connection with the October to December hearing.

At the time of the issuance of my opinion, I received no evidence regarding Mirro d/b/a Future Vision, nor the evidence introduced between May 27 and July 2, 1986, regarding the Corporate Micros and Hollywood Avenue operations.

The Future Vision Computer Store operation at 262 Route 46 East was comprised of the same management team (Anant B. Goel and Zarina Goel as keeper of books and records), employees, customers, and vendors as the business conducted in Union at "Entre," in Wyckoff at "Corporate Micros" and on Holywood [24] Avenue in Fairfield utilizing "MicroAge" invoices. DeBaun testimony, transcript 214 to 219.

The Future Vision business supposedly owned by Barai and DiSabello was the same business owned (in fact, if not on paper in each instance) and operated by Anant B. and Zarina A. Goel under other names since this litigation was commenced.

As for the operation of Future Visions, after it opened Barai worked there part time (the rest devoted to his printing business in Union) and did some buying, some selling, and signed all the checks under Goel's guidance.

He was told by Goel on many occasions, ". . . you are just the president and officer of the company. We can replace you any time." Barai testimony, transcript 85. He considered himself subject to being fired by Goel at any time. Goel also determined how much compensation Barai would receive. The first month Barai received $500; thereafter he received $1,000 per month. Barai testimony, transcript 48; Goel testimony, transcript 471 to 73; Exhibit P-39.

From January to sometime in March or April 1985, labels bearing the name "MicroAge" were placed on the invoices used by Mirro d/b/a Future Vision, although moneys received from sales were deposited into the Mirro accounts. Barai testimony, transcript 40 to 42; DeBaun testimony, transcript 223 to 25. The use of MicroAge invoices by Future Vision and at Hollywood Avenue was intended to conceal the defendants' violation of [25] court orders and Goel's perjury. Subsequently, the MicroAge labels were abandoned in favor of Mirro labels. Barai testimony, transcript 40 to 41; DeBaun testimony, transcript 203 to 05.

A number of other procedures were also employed to hide the Goels' interest in Mirro. One was that Barai would sign blank checks that subsequently could be filled in. Barai testimony, transcript 46 to 48; DeBaun testimony, transcript 223 to 25; Goel testimony, transcript 466 to 71. A substantial number of these presigned checks were filled in by Goel, including checks for MicroAge inventory and employee salaries, such as that of Barai. Goel testimony, transcript 466 to 71; Exhibit P-39.

Goel used the alias "Alan Goldberg" while operating at Mirro. He instructed his employees to turn away callers who asked for him by his real name, and to disavow the affiliation of Anant Goel with the business.

Barai testimony, transcript 39 to 40, 46; DeBaun testimony, transcript 206 to 07, 219, 220, 223. Goel used this alias - and other devices - because "the world" was not supposed to know he was doing business in violation of the injunction. DeBaun testimony, transcript to 22 to 23.

In or about April 1985, Barai sold his printing business in Union. He advised Goel that he was now prepared to invest $75,000 and devote full time to Future Vision, and that [26] he wanted to negotiate a contract specifying his role in the company. Goel refused to give Barai the promised 49 percent "partnership" in the business, stating, "this is the operation where I have put my customers and everything that I have put in, you know I cannot have a partnership here in Future Vision Computer Store." Goel proposed that Barai find another store and that the two of them enter into a 51-49 partnership in that one. Barai testimony, transcript 42 to 44, 102.

Barai determined to start his own business and located one in early May 1985, Lloyd's Computers in Ridgewood. The sale to Barai of that business, which he renamed Micro Gallery, was closed on June 15, 1985. At that time, Barai stopped working for Mirro. Barai testimony, transcript 44 to 45.

When Barai advised Goel that he was leaving Mirro, Goel requested that he continue to sign the checks for the business; Barai agreed to do so for a month or two. Thereafter, Barai signed blank checks at Goel's request, generally 30 to 40 at a time. Sometimes he signed the checks visiting the Future Vision premises to purchase inventory for his own store, at which time they were given to Zarina Goel. On other occasions, a Future Vision employee would bring a bunch of blank checks to Micro

Gallery. Barai testimony, transcript 46 to 48; DeBaun testimony, transcript 223 to 25.

Meanwhile, on May 14, 1985, Goel had moved for an order modifying the terms of his restrictive covenant with Entre as it [27] was enforced by the injunction. On June 24, 1985, I denied the motion, stating in part:

> Simply put, Mr. Goel may not engage in the *sale* of computers, computer components, software or related products or services. It is irrelevant whether the computers and computer products Mr. Goel wishes to sell are new or used, or whether he wishes to sell them to wholesalers, retailers or end users. He and his company simply may not engage in the sale of computers and related products until the one year term of the restrictive covenant, as contained in the preliminary injunction has run.

Opinion, page 6.

In November 1985, Barai advised Goel that he would no longer sign blank checks for Mirro. Barai testimony, transcript 48. Goel responded that he would arrange to have his sister-in-law, Sarala Goel, "buy" the business from Barai. At that time, Barai owned no stock in Mirro and Goel had the corporate kit containing the stock certificates. Barai testimony, transcript 48 to 49; Goel testimony, transcript 47 to 90.

In or about November, a corporate resolution was prepared and backdated to February 5, 1985. It stated that Barai was elected president of Mirro and was authorized to issue 100 shares of stock to himself. Exhibits P-14 and 15. Another document was prepared on the same date, dated November 29, 1985, by which Barai's stock was sold to Sarala Goel for $10,000. Exhibit P-13.

At the same time, another document was prepared [28] and backdated to October 24, 1985, purporting to reflect the sale of (a different) 100 shares in Mirro to Sarala Goel for $2,000. Barai testimony, transcript 50 to 53, 82, 84. That transaction was supposed to demonstrate that Sarala Goel had been engaged in the process of buying Mirro stock prior to Barai's "sellout." Sarala Goel resides in Worthington, Ohio; Barai has never met her. Neither has anyone else connected with the business who testified.

In connection with the sale, Goel, who was nominally not a party to the transaction, executed a release in which he personally agreed to indemnify Barai for all claims arising out of the operation of Mirro. Barai testimony, transcript 40; Goel testimony, transcript 488 to 90; Exhibit P-18. This is contrary to the standard practice of the seller of a business providing a release and indemnification pledge to the buyer.

At the time of the Sarala Goel's purported purchase of all of the issued and outstanding stock of Mirro for a total of $12,000, the corporation had bank deposits averaging $2 million per month. Exhibits P-19 to 20. Profits on sales were in the 4 to 6 percent range. Barai testimony, transcript 121. On the date of the purported sale of Barai's stock, the Mirro bank account at Citizens Bank had a balance in excess of $127,000. Exhibits P-19 to 20.

The stock transaction was a sham and intended to conceal the fact that Mirro Computers, Inc. d/b/a Future Vision [29] Computers was in fact owned and operated by Anant B. and Zarina A. Goel.

Throughout the time period covered by the injunction of October 22, 1984, defendants Anant B. Goel, Zarina

A. Goel, Computomat, Inc., acting intentionally, wilfully and directly contrary to the terms of that injunction, did themselves or through, or in conjunction with other persons, partnerships or corporations, own, maintain, engage in, and have an interest in several businesses specializing in whole or in part in the sale of computer hardware, software or related products and services (a) within the standard metropolitan statistical area in which the Entre Computer Center that they operated was located; or (b) within a radius of 25 miles of the center they operated; or (c) within a radius of 25 miles of any other business using the Entre Computer Centers system.

During the period while defendants were carrying on their computer sales business in violation of the court order as described above, this litigation was proceeding. There is little wonder that the Goels had neither the time nor the inclination to respond to Entre's discovery demands. When forced to answer and thereafter when the truthfulness of their answers was challenged, defendants resorted to additional deceitful and unlawful behavior in order to conceal the falseness of their answers.

On or about March 14, 1986, Goel approached Barai with [30] a document that, with some discrepancies, related a version of Goel's involvement with Mirro identical to the one Goel subsequently told under oath. Goel asked Barai to sign this document which Barai refused because it contained untruths. Barai testimony, transcript 53 to 56; Exhibit P-16.

Goel then prepared an affidavit for Barai to sign which would also corroborate Goel's version of the facts. The affidavit bore this Court's designation at the top, contained the caption of this case, and was intended for

use in connection with this case. Barai refused to sign because it, too, was false. Barai testimony, transcript 56 to 60; Exhibit P-16.

Subsequently, in May, three men entered the premises of Barai's business to discuss Barai's role as a witness in the impending hearing. They identified themselves by first name. They told Barai to tell nothing but the truth, and that "Mr. Goel is a very nice guy and don't hurt him." Barai testimony, transcript 65 to 66. Based on the record in this case, it seems highly likely that the purpose of the visit was to threaten and dissuade Barai from telling the truth. However, it is unnecessary for the purpose of the pending application to make a finding in this regard.

### III. *Credibility Determination*

The defenses which defendants and their counsel advance in opposition to the present application are preposterous.

Their post hearing brief (at page 2) states that "What [31] Mr. Goel and his counsel understand Interrogatory No. 15 to be seeking was whether Mr. Goel had sold computers for his personal benefit after October 22, 1984 . . . What Goel and his counsel understood Interrogatory No. 16 to be seeking was whether Goel had any ownership or controlling interest in any computer retailing stores after October 22, 1984." The interrogatories plainly ask what they ask, and just as plainly each of defendants' three sets of answers was false. Even addressed to the interrogatories as distorted by defendants and their counsel, the answers were false.

Next, in defense of the perjury committed with respect to Interrogatories 4, 15 and 16, defendants' post

hearing brief (at page 2) states, "Ironically, Goel consistently disclosed great amounts of information in response to most of the other interrogatories. In many instances he provided much more information than the interrogatories required." There was nothing ironical about this phenomenon. It is obvious that defendants hoped to bury their falsehoods in a mountain of detail which I shall assume was true and not incriminating him.

The key to defendants' defense, however, is that Goel was telling the truth and Barai was lying, because if Barai is to be believed, Goel's pretense of not engaging in, owning and having an interest in the business of buying and selling computers collapses like a house of cards. Thus defendants urge in their post hearing brief (page 17) that "When one considers [32] all of the evidence that was addressed, Barai's testimony simply cannot be believed."

I find to the contrary. Of all the witnesses who participated in the events at issue, Barai was the only one whom I found to be totally truthful in his testimony at the hearing and totally honorable in his business dealings which were disclosed in his testimony. His only fault was his foolishness in placing trust in Goel and relying upon what Goel told him. Goel, on the other hand, lied on the witness stand whenever it suited his purposes and was an utter scoundrel in his business dealings both before and after I entered a preliminary injunction.

Utter was shown to be a devious businessman, but I conclude his testimony about his dealings with Goel was truthful. It was supported by documentary evidence and by the testimony of other witnesses.

Scharf likewise was shown to be a slippery businessman. His testimony is suspect. For example, he denied dealing with Goel as "Alan Goldberg" until he was confronted with his own invoices which utilized that name.

Peter DeBaun, one of Goel's long-time employees, was called to the stand by defendants. He volunteered nothing, but when confronted with direct questions on cross-examination he answered even though the substance of the answers dealt devastating blows to defendants' position.

[33] Among other things, he stated that throughout the time he was working in the offices at Wyckoff, he considered himself the employee of Goel and Computomat, which continued to pay his salary. DeBaun testimony, transcript 216 to 19. He reviewed Zarina Goel's sales ledger and testified that while he was a Corporate Micros employee, A.B. Goel took orders for computers just as he did when the operation was in Union. DeBaun testimony, transcript 215 to 16. According to DeBaun, the sales activity in Wyckoff constitute a "phasing out" of Computomat and a "phasing in" of Corporate Micros, although the Corporate Micros business was never consummated. DeBaun testimony, transcript 209 to 12. Finally, he stated that certain measures were taken to conceal the fact that Goel was continuing to conduct business after vacating Union, including an alias for Goel ("Alan Goldberg") and the use of invoices with the names of other companies. DeBaun testimony, transcript 222 to 23.

DeBaun subsequently was recalled to the stand to "recant," stating that he was not sure that Goel was taking orders when he was talking to customers on the telephone. He also stated that it was possible that he signed Goel's initials as salesman on invoices if the customer had pre-

viously been Goel's. DeBaun testimony, transcript 382 to 84. His testimony on his first appearance had a ring of truth. He was obviously pained and reluctant to give testimony which was damaging to his long-time employer, but he did so when necessary to answer [34] truthfully and responsively. He was a different person on his second appearance. Although most of his original and very damaging testimony remained unaffected, he did try to blunt the effect of a few of the more damaging points of his earlier testimony. It was a most unpersuasive performance, and served only to accent the enormity of defendants' conduct in this case.

DiSabello showed himself to be a highly educated talented and personable young man, but his role in the formation and operation of Mirro-Future Vision placed him in an untenable position with his franchisor IBM and the realities of the situation and the clear documentary and testimonial evidence belie his claim to a 51 percent ownership interest in Mirro-Future Vision. He was another Goel tool, but for one reason or another failed to testify fully and accurately about his role.

Peter Falting's testimony contributed very little to the resolution of the matter.

Significantly, Zarina Goel, who played a subordinate but neverthless significant role in the continuation of her husband's business in various guises, did not testify. I had concluded after the contempt hearings that she was simply a nominal participant in her husband's affairs and therefore did not hold her responsible for the violations of the Court orders. However, the new evidence submitted at the present hearings shows that all along she had played an active role in Anant [35] Goel's computer businesses and that she too should have been held in contempt.

IV. *The Falseness of the Interrogatory Answers*

A. Interrogatory No. 2, Second Set: In Interrogatory No. 2 of its second set, Entre asked the Goels to identify "each and every bank account in which you had an interest, direct or otherwise, from January 1, 1983 the present." The evidence establishes the Goals' interest in Corporate Micros and Mirro and thus necessarily establishes their interest in those corporations' bank accounts. Indeed, the names of both Goels appeared on signature cards for those accounts. Insofar as those accounts were not identified in the Goels' answer to Interrogatory No. 2, that answer is perjurious.

B. Interrogatory Nos. 14, 15 and 16: Interrogatories 14 and 15 asked if during the period March 1983 to the present Goel as an individual sold computer products or purchased such products and if any entity other than Computomat in which Goel had an interest sold computer products or purchased such products for resale. These interrogatories asked for full details of these sales. Interrogatory 16 asked for the identification of each business entity in which Goel had an interest during the same period and for information concerning disposition and deposits of the proceeds of sales of computer products by those entities.

Defendants' negative answers to Interrogatories 14 and [36] 15 and their specific denial in response to Interrogatory 16 of any interest of Anant and Zarina Goel in any business entity engaged in the purchase or sale of computer products are patently false. Their desparate last minute supplemental answers filed three days before the hearing are longer but equally false.

The evidence summarized above demonstrates that Zarina and Anant Goel never left the computer business

and from the day they lost the Entre franchise they continued to carry on the computer business through a number of entities and using a variety of fraudulent ploys. Whatever the name and whatever the paper ownership may have been, each entity was owned and controlled by Goel, and whenever a person he was using as a front interfered with his ownership and control, Goel simply dumped him and devised some other scheme to camouflage his operations and ownership and control. Thus he used Utter and Corporate Micros in late 1984. When Utter pressed Goel to carry through on the arrangement Goel had originally proposed, Goel transferred the scene of his operation for a short period to Hollywood Avenue in Fairfield, where he stayed while completing his arrangements with Barai. Upon completion of those arrangements Goel continued his business through Mirro Computers, Inc. d/b/a Future Vision. When Barai asked for the 49 percent interest in Mirro which Goel had promised him, Goel refused to carry through on his agreement and Barai left to [37] start his own business, although as an accommodation to Goel he continued to sign checks in blank. When he refused to perform that role any longer, Goel concocted the spurious sale of Barai's nonexistent interest in Mirro to Goel's sister-in-law Sarala Goel, and continued on in the computer business as before.

Throughout this period of maneuvering Goel delt with substantially the same customers he had dealt with when he operated as Computomat, Inc. prior to the termination of his franchise. He used the same employees. His wife Zarina continued to keep the books and performed other office work. In short he conducted the business of the purchase and sale of computer products through entities owned or controlled by him. Thus defendants' answers to

Interrogatories 14, 15 and 16 were wilfully and deliberately false.

The subject matter of the interrogatories was highly material to the issue of damages allegedly suffered by defendants sought in their counterclaim. Defendants have many motives to lie, but the most compelling motive was to avoid further sanctions for contempt. Truthful answers would have disclosed flagrant violations of the preliminary injunction on the part of all three defendants.

C. *Interrogatory No. 19, First Set*: Interrogatory No. 19 sought information concerning offers to purchase Computomat, the corporation through which Goel conducted his Entre franchise [38] prior to termination. A material issue relating to defendants' claim for damages is the value of the former Entre franchise. As described above, the defendants endeavored to create a certain value for that franchise by securing two fraudulent offers to purchase from Barai and from Scharf. These so-called offers were then introduced into the record as defendants' answers to interrogatories. This constituted another falsehood.

## V. *Conclusions of Law*

There is no reported case of which I am aware which deals with party misconduct as egregious as that which has occurred and is occurring in this case. The mere recital of what has happened leads to the inescapable conclusion the Court must, to preserve the integrity of the judicial process, impose the most severe civil sanctions available to it and refer the matter once again to appropriate law enforcement authorities. Nevertheless, it is appropriate to review the case in light of traditional discovery sanctions rules.

The federal standard of dismissal for discovery misconduct was set in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). There, the Court sustained a trial court's dismissal of an action, thereby reversing the United States Court of Appeals for the Third Circuit. The Court specifically noted that dismisssal was warranted where one party and its counsel acted in "callous disregard of responsibilities counsel owe to the court and to [39] their opponents." 427 U.S. 642.

This Circuit followed and refined the *National Hockey* standard in *Poulis v. State Farm Fire and Casualty Co.*, 747 F. 2d 863 (1984), where the dismissal sanction was applied with appropriate findings based upon improper conduct.

The controlling standard set forth in *Poulis* identifies six factors to be weighed and balanced in reviewing a dismissal for default under Rule 37. The six factors are, in the words of the Court:

(1) the extent of the *party's* personal responsibility;

(2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery;

(3) a *history* of dilatoriness;

(4) whether the conduct of the party or attorney was *wilful* or in *bad faith;*

(5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and

(6) the *meritoriousness* of the claim or defense.

747 F. 2d at 868.

The defendants' conduct meets the *Poulis* criteria.

A. *The Defendants are Personally Responsible for the Corrupt and Improper Prosecution of Their Case.*

Anant Goel has lied, he has suborned perjury, he has repeatedly violated court orders, and has invited arrest, and he has attempted to cover up both his lies and his contumacious [40] conduct. Zarina Goel personally participated in various activities in contempt of court orders. She filed knowingly false interrogatory answers. She chose to remain silent and not to contest the evidence.

Among the major instances in which the defendants have personally and deliberately flouted the judicial process are the following:

1. In an order date October 22, 1984, I directed Anant Goel to do two things: (1) cease operating a computer business, and (2) meet promptly with Entre to take a joint inventory of goods held by Goel, which would be purchased by Entre in connection with the termination of the franchise agreement. Within two days Goel had caused at least two truckloads of the store inventory to be removed from the Entre store premises.

2. I held a contempt hearing on October 25, 1984, concerning Goel's removal of the goods from the store. At that hearing, I issued an order from the bench prohibiting Goel from removing any more goods. Within hours of that order, on the afternooon of October 25, and again on October 26, Goel participated in moving the store inventory to the new location.

3. The Goels have continued to operate a computer sales business in wilful violation of the October 22, 1984 order, and have lied repeatedly about their actions under oath and in sworn interrogatory answers. The Goels have continue to [41] operate with a string of fronts -

Corporate Micros, MicroAge and Mirro - with the specific purpose of concealing their involvement in computer sales. Anant Goel went to extraordinary lengths to conceal his involvement with the business, even using the alias "Alan Goldberg."

In this connection, Goel also attempted to suborn perjury by Chandrakant Barai to conceal the Goels' computer business. Goel prepared for Barai's signature and for use in these proceedings an affidavit the substance of which corroborated Goel's story of his involvement in Mirro Computers. Barai declined to sign the false affidavit.

4. Defendants fabricated documentary evidence in order to mislead the Court. Specifically, the two offers to purchase Computomat were prepared, one to be signed by Barai, the other by Aron Scharf. The offers were prepared under Anant Goel's direction, backdated and submitted in response to Entre's interrogatories as purported evidence of the diminution of value of Computomat that had been caused by Entre's actions.

5. The defendants have perjured themselves repeatedly.

a. At the November 7, 1985 contempt hearing Goel testified that the Entre store inventory was hauled away by suppliers who had not been paid, and that he let them take the machines because he had no money. November 7, 1984, transcript 33 to 34. Subsequent hearings have proved that these movements of inventory were simply part of business as usual for the Goels [42] who were acting in violation of the Court's October 22, 1984 order from the moment it went into effect.

b. The Goels have lied about their interest in Corporate Micros and in Mirro Computers. Anant Goel said

that he was "trying to work for" a company named Corporate Micros (November 7, 1984, transcript 39), but that he had not yet been hired and didn't know the identity of the company's principals. Transcript at 40. Goel specifically testified that he had no ownership interest in Corporate Micros and that he didn't know the identity of the officers of the company. *Id.*, transcript 41. Each statement was an outright lie. Goel's untruthful testimony continued at the hearings held on December 26 and 27, 1984.

And, in three sets of interrogatory answers, the Goels failed to reveal their interest in Corporate Micros and Mirro. The present hearings demonstrated the extent of Goel's perjury.

6. The breadth and depth of Anant Goel's misconduct has been so extraordinary that I have already referred the matter to the United States Attorney's office. Opinion, February 25, 1985, page 9. I intend to do so again.

7. The defendants have thwarted discovery and made a mockery of the pretrial process in every possible fashion. The Magistrate issued an order setting the pretrial conference for September 26, 1985. In accordance with that order, the parties were supposed to hold a meeting of counsel ten days before the [43] pretrial, and to file a pretrial statement five days before a pretrial.

The defendants refused to participate in the pretrial process. On the eve of the pretrial conference, Entre had filed its pretrial statement without the benefit of the defendants' participation, and the defendants had filed nothing.

The record is clear in showing that it is the Goels personally who had been the moving force in this conduct. While they attempted to lay off their early misconduct on their first attorney, John Carbone, they have since been represented in these proceedings by the law firms of Benenson and Scher, and Shanley and Fisher, as well as by their present local and out-of-state counsel. Their conduct nevertheless has never changed.

Even with present counsel, the Goels' supplemental and amended answers to interrogatories were deficient and perjurious, as was Anant Goel's testimony at the recent hearings.

Zarina Goel must share the blame with her husband. She signed the interrogatory answers that have been revealed to be false. Certainly, she is not absolved by virtue of her silence at - indeed, her complete absence from - the perjury hearings. At those hearings, her involvement in the defendants' ongoing business activities in violation of the Court's injunction was made plain. Her failure to address the evidence against her [44] must be taken as an admission of guilt.

B. *The Defendants' Misconduct has been Prejudicial to Entre.*

There is obvious prejudice to the judicial system in general, and to Entre as a party, stemming from the defendants' misconduct. The nature of the prejudice is the same as found sufficient in *Poulis* and other cases, but the degree is far more substantial in this instance.

The entire civil contempt process caused Entre to incur substantial costs and to suffer delay in prosecuting this action. Almost two years later, Entre still is incurring

costs as it pursues the defendants through perjury hearings. Years have been consumed with motions and hearings, while the merits of Entre's case are not advanced at all.

The specific prejudice to Entre arising from the defendants' dilatory, inadequate and false discovery responses is obvious. If the defendants are not dismissed and defaulted, Entre will be faced with the prospect of going to trial with inadequate and untruthful information about their case. It would be little use to attempt to supplement and correct the discovery already provided, because one can believe nothing defendants say.

C. *The Defendants' Conduct has been Consistently Dilatory.*

The details of defendants' delays were initially set [45] forth at page 26 of the transcript of the November 26, 1985 proceedings before Magistrate Perretti.

The Magistrate pointed out that Entre filed its original discovery requests on May 6 and 28, 1985. The Goels provided no answers. So on July 19, Entre filed its motion to compel. A hearing was held on the motion, and the Goels were ordered to respond to the Entre requests by August 2, 1985 or face daily monetary sanctions ($200 to $500 per day). In addition, the Magistrate ordered that the Goels would be subject to arrest if there was no response by August 9.

On the day they became subject to arrest, the Goels filed the inadequate answers that triggered the sanctions under discussion. It was obvious that they had answered only to avoid the sanction of arrest. The Magistrate put it succintcly:

> . . . the defendants only contrived to stave off their arrest by interposing the answers to the interrogatories which are now complained about.

November 26, 1985, transcript 26 to 27.

The Goels also failed to abide by the Magistrate's schedule for preparing pretrial stipulation with Entre. They did not participate at all in that process.

The delay and dilatory tactics continue even though the defendants have new counsel. On January 8, 1986 I gave the defendants "one final opportunity" to redeem their case because of the anticipated diligent and effective conduct of their new [46] counsel. Transcript at 13. The offer was specifically conditioned upon the filing of fully responsive answers to Entre's interrogatories, and upon curing all defects in the answers. The answers that the Goels subsequently filed were perjurious in claiming (once again) that they had "no" interest in any computer business.

On May 23, 1986, the Friday before the Monday on which the perjury hearings began, the Goels filed yet another amended answer to the interrogatories, the third time that they purported to answer the particular interrogatories in question. As noted above, even those answers - submitted after Entre completed its discovery - were perjurious.

The net effect of this conduct is that the defendants have successfully deflected meaningful discovery for the two years that this suit has been pending.

D. *The Defendants' Conduct was Wilful and in Bad Faith.*

*Poulis* involved misconduct on the part of counsel, with repeated episodes of missed deadlines and clashes

with the Court. Counsel did offer excuses, including his own illness and his wife's difficult pregnancy. Based upon those considerations the *Poulis* court found no wilfulness or bad faith.

The defendants are entirely different from the *Poulis* attorney, for there is no possible justification or excuse for their conduct. They have deliberately sought to stay in the [47] computer business, notwithstanding court orders to the contrary, and they have engaged in an organized and deliberate campaign of fabrication and perjury in order to conceal their business enterprises.

*Poulis* concerned an ill attorney with an ill and pregnant wife. This case concerns defendants who personally are willing to prepare fraudulent affidavits for use in court proceedings. The differences between the two cases are clear.

E. *Sanctions Other than Dismissal and Default are Meaningless to the Defendants.*

Magistrate Perretti correctly observed:

> I have been led to the inescapable conclusion that there is no sanction in the world that will cause these people, the Goels, to comply with a court order.

November 26, 1985, transcript 28 to 29. Sanctions are intended to serve the purpose, among others, of forcing a litigant to comply with the rules and orders of a court. In this case *no* sanction has yet been successful in coercing the Goels to follow the rules. For example:

(1) On February 25, 1985, I referred Goel to the United States Attorney for consideration of criminal prosecution

of his perjury. As recently as the belated discovery responses filed by the Goels on May 23, 1986 and at the recent hearings, Goel has continued to perjure himself and to suborn the perjury of others.

[48] (2) I held Goel in civil contempt for defying the injunction of October 22, 1984, which required him to inventory the store contents with Entre, and to refrain from engaging in the retail computer business. The Goels never ceased their operations, and thus have continued to disobey a court order.

(3) Goel was assessed a penalty of $36,000 for fees and costs incurred by Entre in pursuing its contempt remedy. The assessment was ordered on September 9, 1985. On July 29, 1985, the Goels were ordered to respond to Entre discovery requests under threat of daily monetary penalties beginning August 2, 1985, and the threat of arrest beyond August 9, 1985. The Magistrate noted their open defiance of and indifference to these sanctions:

> . . . the defendants only contrived to stave off their arrest by interposing the answers to the interrogatories.

November 26, 1985, transcript 26.

Moreover, even the threat of arrest was insufficient to cause the Goels to file adequate responses to interrogatories. (November 26, 1985, transcript, 35 to 36); and there have been no satisfactory responses to this date.

(4) Despite *all* of the above, I gave the Goels one last chance to pursue this matter honestly. They have forsaken that chance.

6. *The Balance of Merits Favor Entre.*

[49] I have already addressed the merits of Entre's claims. In granting Entre's motion for preliminary injunction on October 11, 1984, after a full evidential hearing I stated: "[T]he evidence establishes conclusively, and essentially without contradiction, that since at least mid-1983 defendants have systematically and continuously perpetrated a major fraud upon plaintiff." Opinion, page 4. I concluded that it was "inconceivable . . . that plaintiff will not be able to establish at the trial calculated, continuing, serious fraud perpetrated by the defendants upon plaintiff designed to cheat plaintiff out of the royalties to which it was entitled under the franchise agreement." Opinion at 10 to 11.

The merits of the defendants' claims are at best unclear. As the Magistrate observed Entre had been at a serious disadvantage throughout this case in attempting to counter many of the defendants' defenses and counterclaims because it was impossible to penetrate and evaluate them. November 26, 1985, transcript 29. The defendants' conduct before the Court, however, and the testimony of those witnesses who have dealt with them, provides a good clue to their business behavior. This is essentially a case in which the allegations of each side to say that the other has engaged in fraudulent and unfair business practices.

I have considered an extraordinary amount of evidence since the institution of this action. None of it disclosed [50] fraudulent conduct on Entre's part; much of it discloses fraudulent conduct on defendants' part both before and after the termination of the franchise. It is possible, I suppose, that leopards can change their spots, but it seems unlikely here.

However, whatever the merits of defendants' counterclaim, defendants' conduct here has been so bad and so destructive of the judicial process that they have forfeited their right to pursue any claims in this proceeding.

*Poulis* requires a balancing of the six criteria, with no single criterion being dispositive; the Court described its review of the trial court decision as "the manner in which the trial court *balanced* the following [six] factors . . ." 747 F. 2d at page 70. Indeed, the Court in *Poulis* applied the balancing test by affirming the dismissal even though the defendant could not make a showing under two of the six criteria. *Id.* at 868 and 69 (plaintiff not personally responsible for delays and no showing of bad faith or wilfulness). Here the balancing process requires the imposition of a sanction of dismissal of the counterclaim.

Fed. R. Civ. P. 37(b)(2) governing sanctions provides in its concluding paragraph that:

> In lieu of any of the foregoing orders or in addition thereto, the Court *shall* require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees caused by the failure, unless the court finds the failure was substantially justified or that other [51] circumstances make an award of expenses unjust.

This is an appropriate case for an award of attorneys fees and costs and provision will be made therefore in the order disposing of Entre's motion.

I request that Entre's attorney prepare an appropriate form of order.

I will want an extra copy of the transcript for the U.S. Attorney's office.

## APPENDIX D

(Filed December 1, 1986)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

---

C.A. No. 84-2699

---

ENTRE COMPUTER CENTERS, INC.,
A DELAWARE CORPORATION,
Plaintiff,

v.

ANANT B. GOEL, ZARINA A. GOEL, AND COMPUTOMAT, INC., A NEW JERSEY CORPORATION,
Defendants.

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Dickinson R. Debevoise, Judge

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### AMENDED ORDER OF DEFAULT

THIS MATTER was opened to the Court on May 27, 1986, on the application of Schmeltzer, Aptaker & Sheppard, P.C., Saiber, Schlesinger, Satz & Goldstein, and Pitney, Hardin, Kipp & Szuch, attorneys for Plaintiff Entre Computer Centers, Inc., in the presence of the Law Firm of Edward A. McConwell, and Stryker, Tams & Dill, attorneys for Defendants, for the entry of an Order pursuant to Fed. R. Civ. P. 37(d), dismissing Defendants' counter-

claims and striking their answer for failure to answer interrogatories submitted under Fed. R. Civ. P. 33 and failure to respond to requests for production of documents submitted under Fed. R. Civ. P. 34, and for their failure to comply with Orders of United States Magistrate Serena Peretti and of this Court compelling complete and truthful answers, and for an Order granting a default judgment in favor of Plaintiff on its claims.

In accordance with the Opinion of the Court dated August 15, 1986, it is on this 1st day of December, 1986,

ORDERED that the counterclaims asserted by Defendants are hereby dismissed, Defendants' answer is hereby stricken, and a default is hereby entered in favor of Plaintiff on its claims, with the exception of Plaintiff's claims alleging violations of the Racketeer Influenced and Corrupt Organizations Act; it is further

ORDERED that the Plaintiff is awarded attorneys' fees and costs incurred in connection with the investigation, preparation, and presentation of this Motion. Plaintiff's attorneys are required to prepare affidavits detailing the fees and costs incurred and to file them with this Court; and further

ORDERED that a hearing to determine the amount of damages to be recovered by Plaintiff be held on November 19, 1986.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise
United States District Judge

## APPENDIX E

(Filed December 1, 1986)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

---

Civil Action No. 84-2699

---

ENTRE COMPUTER CENTERS, INC.,
a Delaware corporation,
Plaintiff,

v.

ANANT B. GOEL, ZARINA A. GOEL, and COMPUTO-MAT, INC., a New Jersey corporation,
Defendants.

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Hon. Dickinson R. Debevoise, U.S.D.J.

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### DEFAULT JUDGMENT

THIS MATTER having been opened to the Court on November 19, 1986, on the application of Schmeltzer, Aptaker & Sheppard, P.C., Saiber, Schlesinger, Satz & Goldstein, and Pitney, Hardin, Kipp & Szuch, attorneys for plaintiff Entre Computer Centers, Inc., in the presence of the Law Firm of Edward A. McConwell, and Stryker, Tams & Dill, attorneys for defendants, for the entry of a Default Judgment, awarding to plaintiff its damages

suffered by reason of defendants' acts as alleged in plaintiff's Complaint and its attorneys' fees and costs incurred in connection with the investigation, preparation, and presentation of plaintiff's Motion for Default and Dismissal, and the Court having considered the papers filed in support thereof and the papers filed in opposition thereto, and the oral argument of counsel, and for good cause shown,

IT IS on this 1st day of December, 1986

ORDERED that defendants shall pay to plaintiff the sum of $772,169.94, representing plaintiff's damages; and

IT IS FURTHER ORDERED that defendants shall pay to plaintiff the sum of $135,158.75, representing plaintiff's reasonable attorneys' fees, and the sum of $13,526.50, representing plaintiff's costs incurred in connection with the investigation, preparation, and presentation of plaintiff's Motion for Default and Dismissal; and

IT IS FURTHER ORDERED that no punitive damages will be awarded, notwithstanding the fact that I have found the defendants guilty of actual malice; and

IT IS FURTHER ORDERED that plaintiff's claim for damages under the Racketeer Influenced and Corrupt Organizations Act be, and the same is hereby dismissed with prejudice.

/s/ Dickinson R. Debevoise
Hon. Dickinson R. Debevoise,
U.S.D.J.

## APPENDIX F

## CONSTITUTIONAL & STATUTORY PROVISIONS & RULES

1. U.S. Constitution - Fifth Amendment:

   "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. U.S. Constitution - Sixth Amendment:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. U.S. Constitution - Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of of the common law."

4. 18 U.S.C. §1621 - Perjury generally:

"Whoever -

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS §1746], willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000.00 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

5. Federal Rules of Civil Procedure, Rule 37 - Failure to Make Discovery: Sanctions—

(b) Failure to Comply with Order—

"(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1090

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

ANANT B. GOEL, ZARINA A. GOEL,
COMPUTOMAT, INC.,
*Petitioners,*

v.

ENTRE COMPUTER CENTERS, INC.,
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether the district court properly applied the well-settled principles of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and properly exercised its inherent power to protect the integrity of the judicial process, in deciding to enter an order of default and dismissal against petitioners as a sanction for discovery abuse.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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**No. 87-1090**

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ANANT B. GOEL, ZARINA A. GOEL,
COMPUTOMAT, INC.,

*Petitioners,*

v.

ENTRE COMPUTER CENTERS, INC.,

*Respondent.*

---

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Entre Computer Centers, Inc. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit, which affirmed the judgment of the United States District Court for the District of New Jersey.

### STATEMENT OF THE CASE

This case concerns a district court's exercise of its discretion to impose the sanction of default and dismissal upon petitioners pursuant to Fed.R.Civ.P. 37

and the court's inherent power to preserve the integrity of the judicial process. In so acting, the court noted, "There is no reported case of which I am aware which deals with party misconduct as egregious as that which has occurred and is occurring in this case." Pet. at A40.[1] The decision was supported by a detailed 51-page opinion (pet. at A8-51) and was affirmed by the Third Circuit for the reasons stated in that opinion. None of the district court's findings of fact have been challenged by petitioners. The court's decision comports with well-established case-law and with the Federal Rules, and presents no error or novel question of law that warrants review by this Court.

The case was filed by respondent Entre Computer Centers, Inc., a franchisor of retail computer centers, on July 10, 1984, in the United States District Court for the Eastern District of Virginia, naming as defendants Entre's franchisees Anant B. Goel ("Goel") and his wife Zarina A. Goel, and their wholly owned corporation, Computomat, Inc. The action was subsequently transferred to the District of New Jersey. Pet. at A9.

The complaint contained counts for fraud, breach of contract, unfair competition, and violations of the Racketeer Influenced and Corrupt Organizations Act. Petitioners answered and asserted counterclaims alleging breach of contract, fraud, wrongful termination, and antitrust and RICO violations. Pet. at A9.

In October 1984, the district court entered a preliminary injunction in favor of Entre terminating the

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[1] Citations to "pet. at ___" refer to petitioners' brief and its appendices.

petitioners' franchise based on "conclusive" evidence of fraud.[2] The injunction provided for conveyance of the business premises and an orderly turnover of inventory to Entre; it also specifically enforced the terms of a post-termination covenant-not-to-compete, which was a part of the relief requested by Entre in its complaint. Pet. at A16-17.

A series of hearings in the Fall of 1984 established that Anant Goel and Computomat had willfully violated both the injunction and a subsequent bench order regarding the inventory, and that Goel had repeatedly committed perjury when testifying about compliance with those orders. On February 25, 1985, the court held Goel and Computomat in contempt and referred the matter to the United States Attorney for appropriate action. Entre was awarded attorneys' fees and costs incurred in connection with the contempt proceedings. Pet. at A17-18. Based on subsequent evidence, the court later would find that Zarina Goel also should have been held in contempt. Pet. at A37.

In the interim, on January 22, 1985, Computomat—the corporate shell through which the Goels operated their Entre franchise—filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. Computomat's nominal participation in the litigation ceased until it "rejoined" the proceedings on its own motion on February 14, 1986.

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[2] Petitioners apparently now question the district court's holding that "[t]he evidence establishes conclusively, and essentially without contradiction, that since at least mid-1983 defendants have systematically and continuously perpetrated a major fraud upon plaintiff" (pet. at A16). *See id.* at 3. They did not challenge this holding on appeal.

In May 1985, Entre served two sets of interrogatories and requests for production of documents upon the Goels; they were ignored, prompting a motion to compel that was granted on July 29, 1985, by the magistrate who was overseeing the pretrial proceedings. Citing the Goels' history of litigation misconduct, the magistrate ordered a series of escalating fines in the event of noncompliance, and provided that Entre might move for their arrest should they fail to comply by August 8. Even so, discovery responses were not served until August 9, 1985, and fines were imposed.[3] Pet. at A10.

The Goels then ignored a court order to participate in the preparation of a joint pretrial statement, which was to be filed in September 1985. The Goels filed no pretrial statement at all. Pet. at A47.

Based on the inadequacy of the discovery responses that finally were served by the Goels and on their failure to file a pretrial statement, Entre filed a motion to dismiss and for a default judgment pursuant to Rules 37(b)(2)(C) and (d) of the Federal Rules of Civil Procedure. While the motion was pending and with the aid of new attorneys who were substituted for one of the two firms then providing their counsel, the Goels filed "supplemental" answers to a few of the interrogatories. Pet. at A10.

On December 2, 1985, the magistrate issued a Report and Recommendation applying the criteria established in *National Hockey League v. Metropolitan*

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[3] Petitioners incorrectly state that they were not required to provide answers until August 11, 1985, thereby creating the misimpression that they answered the interrogatories early and without incurring fines. Pet. at 5.

*Hockey Club, Inc.*, 427 U.S. 639 (1976) and *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), and concluding that the district court should grant Entre's motion as a sanction for the Goels' failure to comply with discovery orders and for their filing of inadequate answers that were interposed solely "to stave off their arrest." Pet. at A10-11.

On January 8, 1986, the district court ruled that although it had "no doubt . . . that the recommendations of the magistrate were the proper ones," it would give the Goels "one final opportunity" to avoid dismissal and default, expressly conditioned on their filing "fully responsive answers" to interrogatories and producing all identified documents. The court held that supplemental responses notwithstanding, the entire response was still "grievously deficient." Pet. at A11.

In February 1986, the Goels served new interrogatory answers and produced documents.[4] Entre then proffered to the court that the Goels had once more evaded discovery by filing perjurious answers. Pet. at A12-13.

The court granted Entre sixty days to conduct discovery aimed at substantiating its proffer. Upon com-

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[4] Although petitioners repeatedly characterize their production as comprising "literally thousands of documents" (pet. at 6, 19, 25 n.2), in fact they provided documents labelled Exhibits 1-222. While the volume of documents produced is not relevant, we note that the district court observed, "It is obvious that defendants hoped to bury their falsehoods in a mountain of detail which I shall assume was true and not incriminating . . . ." Pet. at A35.

pletion of discovery, Entre renewed its Rule 37 motion and evidentiary hearings were scheduled. On May 23, 1986, one business day before the hearings began, the Goels again filed supplemental answers. Pet. at A13-14.

Four days of hearings were held in May through July 1986, involving the testimony of seven witnesses and numerous documents; post-hearing briefs were requested and filed. On August 15, 1986, the court ruled that the evidence established "beyond any doubt" that the Goels had committed perjury in their sworn responses to a total of five interrogatories that had been put at issue in the hearings; committed perjury at several hearings; attempted to suborn perjury; and fabricated evidence and court documents.[5] Applying the principles established by *National Hockey League* and *Poulis*, and acting as well pursuant to its inherent power to preserve the integrity of the judicial process, the court granted Entre's motion for default and dismissal, and awarded Entre its attorneys' fees and costs incurred in connection with the hearings. Pet. at A14-15.

A hearing on damages was held on November 19, 1986. Judgment in favor of Entre was entered on December 3, 1986.

On August 31, 1987, the United States Court of Appeals for the Third Circuit affirmed the judgment for the reasons stated in the district court's opinion. The court of appeals found that

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[5] The court also deemed it "highly likely" that Anant Goel had sent three men to threaten a witness prior to the hearings, but found it unnecessary to make a finding to that effect for the purpose of ruling on the motion. Pet. at A34.

> the behavior of the defendants was so flagrant and inexcusable that default was not only justified but indeed mandated. The district judge, in a detailed and comprehensive opinion, painstakingly reviewed the defendants' repeated evasions of their obligations in the conduct of the litigation and their outright perjury on certain occasions.

Pet. at A4. A petition for rehearing filed by petitioners was denied by the Third Circuit on September 28, 1987. Pet. at A6-7.

## REASONS WHY THE WRIT SHOULD BE DENIED

**1. No reason exists for the granting of certiorari because the issues raised by petitioners are already controlled by well-established precedent.**

This case is wholly controlled by the Federal Rules of Civil Procedure and Supreme Court precedent. The power to enter an order of default and dismissal as a sanction for discovery abuse is granted by Rule 37 and defined by *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). This case fits squarely within the Rule as defined. It presents no new or important issue for the Court to address and its decision would not meaningfully supplement the jurisprudence of Rule 37.

Federal Rule of Civil Procedure 37(b)(2)(C) states that where a party fails to obey an order to provide discovery, the court in which the action is pending "may make such orders in regard to the failure as are just," including an order "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

. . . ."[6] The parameters of the Rule have been established by this Court. The sanction of default or dismissal is not authorized where the party's failure to comply with a discovery order is due to "inability." *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958). Default or dismissal is an appropriate sanction, however, for a party's "flagrant bad faith" and "callous disregard" of its responsibilities. *National Hockey League*, 427 U.S. at 643.

In reviewing petitioners' discovery misconduct—which included but was not limited to written and oral perjury—and holding that default and dismissal were warranted, the district court below found "no reported case of which I am aware which deals with party misconduct as egregious as that which has occurred and is occurring in this case." Pet. at A40. Petitioners have not challenged this or any other factual finding made by the district court; it follows necessarily that the court's conclusions of law were correct.[7] Or, as the Third Circuit held, petitioners' behavior "was so flagrant and inexcusable that default was not only justified but indeed mandated." Pet. at A4. This case is wholly controlled by Supreme Court precedent; it presents nothing new for this Court to decide, and the petition for certiorari therefore should be denied.

Indeed, this case is identical to *National Hockey League*—except that the conduct punished here was

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[6] Under Rule 37(d), this sanction also applies to a party's failure to provide discovery even in the absence of a prior court order.

[7] The correctness of the court's factual findings and decision is discussed below at pages 13-20.

far worse.[8] Rather than address that decision, however, petitioners have relegated it to a single sentence in their brief, implicitly conceding the lack of merit in their petition. Pet. at 15. They rely instead on *Hovey v. Elliott*, 167 U.S. 409 (1897), and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), but have misinterpreted and misapplied those cases.

In *Hovey v. Elliott*, 167 U.S. at 413, the Court held that due process was denied a defendant who suffered the striking of his answer and a default judgment as punishment for contempt of an order requiring him to pay into the court a sum of money the right to which was at issue in the suit. This holding was "substantially modified"[9] by *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), where the Court ruled that it was consistent with due process for a state court to employ the identical sanction for failure to produce documents in accordance with a pretrial order. The bounds of due process have thus been defined by prohibiting use of the default sanction as mere punishment for failure to do that which the party may not have had the power to do (*Hovey*) but permitting entry of default in the discovery context as consistent with the presumption that the refusal to produce material (and, in this case, truthful) evidence is an admission that the wrongdoer's claims and defenses lack merit (*Hammond Packing*). *See Rog-*

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[8] In *National Hockey League*, sanctions were imposed because interrogatories went "substantially unanswered" despite numerous extensions and "several admonitions" by the district court. 427 U.S. at 642.

[9] *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. at 209-10.

*ers*, 357 U.S. at 210. While the early jurisprudence in this area may be interesting, it is of no help to petitioners. The availability of default and dismissal as a sanction for discovery abuse is established by Rule 37(b)(2)(C) and has been reaffirmed by this Court.

Petitioners' reliance on *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), is likewise misplaced; they argue incorrectly that it holds that any sanction imposed under Rule 37(b)(2) must be specifically aimed at the particular "claim" that was at issue in the order to provide discovery. Pet. at 17, 22-25. Rule 37(b)(2) contains a variety of different sanctions from which a district court may choose when faced with disobedience of a discovery order. *Insurance Corp. of Ireland* involved subsection (A) of the Rule, which states that the court may hold that certain facts "shall be taken to be established for the purposes of the action in accordance with the *claim* of the party obtaining the order. . . " (emphasis added).

Subsection (C) of Rule 37(b)(2)—the subsection at issue in the present case—goes farther than subsection (A) and allows the court to enter an order of default or dismissal as a sanction for discovery abuse. Necessarily, an order entered pursuant to this subsection need not be tailored to a specific claim of a party.

Even if the district court were required to find that the discovery order related to the parties' claims, this would not help petitioners because the court found that the interrogatories and the perjurious answers were directly relevant. The court found the subject matter of three of the interrogatories in question "highly material to the issue of damages allegedly

suffered by defendants sought in their counterclaim." Pet. at A40. Additionally, "[t]ruthful answers [to those interrogatories] would have disclosed flagrant violations of the preliminary injunction on the part of all three defendants." *Id.* These interrogatories were also relevant insofar as the injunction enforced a covenant-not-to-compete contained in the franchise agreement, relief specifically sought in Entre's complaint. A truthful answer to the fourth interrogatory would have revealed bank accounts that held the proceeds of petitioners' illicit activities, relevant again to their damages and their violation of the injunction. Pet. at A38. And the fifth concerned offers to purchase petitioners' franchise, in response to which petitioners referenced and produced two fraudulent offers. The court found the value of the franchise to be a "material issue relating to defendants' claim for damages." Pet. at A40.

**2. The writ should be denied because the courts of appeal have consistently followed this Court's decisions in determining whether to impose sanctions under Rule 37 and there is no conflict in the circuits for this Court to address.**

Petitioners argue that the appellate courts have been "struggling to devise consistent guidelines" under Rule 37 and that a "patchwork quilt" has resulted in this area of the law. Pet. at 16. They say that a writ of certiorari must be granted because "this Court must resolve the question of whether the express consideration and application of lesser sanctions is a necessary prerequisite in the application of Rule 37 sanctions." Pet. at 17. The cases cited in their own brief dispel this notion.

The courts of appeal are of course required to follow the dictates of *National Hockey League* in cases involving default or dismissal under Rule 37. Petitioners concede that the Second, Fifth, Sixth, Eleventh, and District of Columbia Circuits all employ the same analysis in Rule 37 cases,[10] inexplicably omitting the Third Circuit from this list.[11] Petitioners note that the First Circuit does not require the consideration of alternative sanctions, as do the other courts, but cite a case in which the court correctly applies the principles set forth in *National Hockey League*.[12]

The decision whether to impose sanctions under Rule 37—as well as the approach to be taken in such

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[10] Although petitioners state that "the Eleventh Circuit appears to differ from panel to panel" (pet. at 16), a comparison of the two cases they cite fails to reveal any basis for that statement. *See Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir. 1986); *Camp v. Oliver*, 798 F.2d 434 (11th Cir. 1986).

[11] As with their discussion of the Eleventh Circuit caselaw, petitioners' remark that the Third Circuit "differs" from panel to panel is unsupported by the two cases cited in their brief. In fact, those cases, *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), and *Scarborough v. Eubanks*, 747 F.2d 871 (3d Cir. 1984), were argued before and decided by the same panel on the same day, and involved a single attorney's conduct before a single district judge. In both cases, the panel applied the same six-part test—including a review of possible alternative sanctions.

[12] In *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 15 (1st Cir. 1983), cited by petitioners, the court noted quite correctly that "[t]here is nothing in [Rule 37] that states or suggests that the sanction of dismissal can be used only after all the other sanctions have been considered or tried." The court followed *National Hockey League* in affirming a dismissal imposed as a sanction for discovery abuse. *Id.* at 15-16.

cases—is committed to the discretion of the lower courts. The circuits have adopted remarkably uniform approaches; as a matter of discretion, six out of seven have determined that a review of alternative sanctions is required. All seven explicitly follow the principles of *National Hockey League* and *Rogers* and all impose the extreme sanction of default and dismissal only where it is found to be warranted. There is no conflict for this Court to settle.

Even if there were a conflict over whether a review of alternative sanctions is a prerequisite to ordering default and dismissal—the only "conflict" petitioners assert—petitioners received the benefit of the more stringent test because the district court weighed that factor in reaching its decision on their case. Pet. at A48-49. Assuming then that this argument was not entirely frivolous, petitioners would have no standing to make it.

**3. Petitioners are incorrect that the writ should be granted because they were sanctioned too severely; the guidelines for imposing the sanction of default and dismissal ensure that it will be reserved for extreme cases and the district court properly applied those guidelines to the facts of this case.**

Petitioners argue incorrectly that a writ of certiorari should be granted because the sanction imposed upon them was "unjust" and unrelated to the merits of the case.[13] This Court and the Third Circuit have recognized that default and dismissal is an extreme sanction and have established guidelines for its

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[13] As discussed above at pages 10-11, the district court found that the interrogatories in question were directly relevant to the merits of the case.

imposition that take this into account. The district court properly applied those guidelines to the facts before it in sanctioning petitioners for their misconduct.

When reviewing sanctions imposed under Rule 37, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *National Hockey League*, 427 U.S. at 642. As a response to the admonition in *National Hockey League* that default and dismissal is an "extreme" sanction (*id.* at 643), the Third Circuit has developed a six-part test that is to be applied in determining whether to impose that sanction under Rule 37: the court must balance (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) the history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

In *National Hockey League*, this Court held that it was a proper exercise of district court discretion to dismiss claims where interrogatories remained "substantially unanswered" despite numerous extensions and "several admonitions" by the district court. *Id.* These facts pale in comparison to the following ones, which were found by the court below in accordance with the Third Circuit *Poulis* test:

1. The petitioners were "personally responsible for the corrupt and improper prosecution of their case." Pet. at A42. In addition to personally signing the perjurious interrogatory answers, one or all of the petitioners were found to have acted in contempt of court orders; "perjured themselves repeatedly"; suborned perjury; fabricated documents and affidavits to be used as court exhibits; and "thwarted discovery and made a mockery of the pretrial process in every possible fashion." Pet. at A42-45.

2. The petitioners' misconduct was prejudicial to Entre. The district court found that Entre had suffered substantial costs and delay in prosecuting its claims; its time was devoted instead to pursuing petitioners through the civil contempt process and in perjury hearings. As the court stated, "Years have been consumed with motions and hearings, while the merits of Entre's case are not advanced at all." Pet. at A45-46. The court found that permitting the case to continue would present Entre with "the prospect of going to trial with inadequate and untruthful information about their case. It would be [of] little use to attempt to supplement and correct the discovery already provided, because one can believe nothing defendants say." Pet. at A46.

3. Petitioners' conduct in the district court was "consistently dilatory." Pet. at A46. They failed to serve timely discovery responses, requiring Entre to file a motion to compel (pet. at A46); ignored fines and "only contrived to stave off their arrest by interposing" untimely, inadequate interrogatory answers (A46-47); "did not participate at all" in the preparation and filing of a pretrial stipulation (A47); and filed two "supplemental" sets of perjurious in-

terrogatory answers even after receiving "'one final opportunity' to redeem their case because of the anticipated diligent and effective conduct of their new counsel" (A47).[14] The court concluded, "The net effect of this conduct is that the defendants have successfully deflected meaningful discovery for the two years that this suit has been pending." Pet. at A47.

4. The petitioners' conduct was "wilful and in bad faith." Pet. at A47. The court noted that *Poulis*, the leading Third Circuit case, concerned misconduct on the part of counsel who clashed with the court and repeatedly missed deadlines because of family illnesses. In contrast, the court found, "This case concerns defendants who personally are willing to prepare fraudulent affidavits for use in court proceedings. The differences between the two cases are clear." Pet. at A48.

5. The court examined the possibility of imposing alternative sanctions, but found that "sanctions other than dismissal and default are meaningless to the defendants." With approval, the court quoted the magistrate, who had said, "I have been led to the inescapable conclusion that there is no sanction in the world that will cause these people, the Goels, to comply with a court order." Pet. at A48. The court noted that despite prior sanctions including referral for criminal prosecution, civil contempt, attorneys' fees, monetary penalties, and the threat of arrest, "*no* sanction has yet been successful in coercing the Goels to follow the rules" and "there have been no satis-

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[14] As the court found, petitioners' misconduct was consistent throughout the case, even though they were represented at various times by five different law firms. Pet. at A45.

factory responses to this date." Pet. at A48, A49 (emphasis in original).

6. Finally, the court balanced the merits of both parties' claims. It reiterated its holding, made earlier in the case, that "the evidence establishes conclusively, and essentially without contradiction, that since at least mid-1983 defendants have systematically and continuously perpetrated a major fraud upon plaintiff." The merits of petitioners' claims and defenses, on the other hand, were found to be "at best unclear" because their own misconduct had made it "impossible to penetrate and evaluate them." Pet. at A50. Noting that it had reviewed an "extraordinary amount of evidence," the court found, "None of it disclosed fraudulent conduct on Entre's part; much of it discloses fraudulent conduct on defendants' part both before and after the termination of the franchise." Pet. at A50.

Given these findings, the court acted well within its discretionary authority when it imposed the sanction of default and dismissal.[15]

Additionally, the court committed no error by subjecting Computomat to the same sanctions as the Goels. It was agreed and understood by all from the beginning of the case that the Goels and Computomat were synonymous.[16] At an early hearing, the court

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[15] Petitioners' assertion that the sanction imposed was an "improper way to deal with perjury" (pet. at 20) does not require rebuttal.

[16] The Computomat certificate of incorporation listed Anant B. Goel as the entire board of directors. Cert. of incorp., filed Jan. 3, 1983. Goel testified that when he said "I," he was referring to himself and Computomat. Hearing tr., Dec. 26, 1984 at 42.

found a "unity" of Computomat and the Goels. Hearing tr., Oct. 11, 1984 at 177. Petitioners have never contested this finding. Only once did the Goels attempt to draw a distinction between themselves and their corporate shell. Computomat was in bankruptcy when the court granted Entre's request that it be permitted discovery into the perjury issue. All other discovery by either side had been suspended by the court. Opinion, Jan. 8, 1986, tr. at 15. Computomat obtained a partial lifting of the automatic bankruptcy stay and requested the district court to permit it to rejoin the litigation. Order, Feb. 18, 1986. Thus, Computomat was a participating litigant at the perjury hearings, and the misdeeds of its officer and board of directors—Anant Goel—were its misdeeds as well.[17]

Indeed, the unity of the Goels and their corporate shell was so well understood that it was never challenged by petitioners in the district court. Therefore, the Court should not address this argument. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).[18] But even if

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In their interrogatory answers, the Goels identified Computomat as their "corporate name." Ans. to int. no. 2 of first set, dated Feb. 21, 1986.

Because Computomat's "independence" from the Goels was not argued to the district court (see below), the court did not discuss this issue in its opinion. The exhibits and orders cited in this portion of respondent's brief are part of the record in the district court.

[17] Computomat also was specifically held liable for the fraud perpetrated upon Entre, for the subsequent contempt of the injunction, and for the attorneys' fees awarded to Entre in connection with the contempt proceedings. Pet. at A16, A28.

[18] "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

it had been raised, the district court clearly would have been required to reject it. Under New Jersey law, "the purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, . . to perpetrate fraud, to accomplish a crime, or otherwise to evade the law . . . ." *New Jersey v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 164 (1983). The veil will be pierced where a corporation has "no separate existence" but is "merely a conduit" for its owner. *Id.* Where the corporate officer's wrongdoing smacks of immoral or illegal conduct "[t]here is no veil to pierce. A corporation, as such, has no moral character. The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction. . . ." *Trap Rock Indus., Inc. v. Kohl*, 59 N.J. 471, 284 A.2d 161, 167 (1971), *cert. denied*, 405 U.S. 1065 (1972). It clearly was necessary and proper to pierce the Computomat veil to effectuate the sanctions imposed on the Goels.[19]

Finally, while the facts demonstrate that petitioners were wholly worthy of the sanctions imposed on them, the district court's decision serves a broader purpose as well. In *National Hockey League*, this Court rec-

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Petitioners have not argued that their failure to raise this point in the district court was due to exceptional circumstances.

[19] Moreover, questions of piercing the corporate veil are well-settled matters of state law that turn on the particularized facts of each case. Petitioners present no important legal issue requiring this Court's attention. To the extent that petitioners' argument is that it was wrong to pierce the Computomat veil "sub silentio" (pet. at 18), we note again that no findings were made in this regard by the district court because petitioners never raised the point.

ognized the valuable deterrent effect of Rule 37 sanctions:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals [reversing a dismissal sanction] remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

427 U.S. at 643 (emphasis in original). Aside from the implications for the immediate case, this Court cannot pardon petitioners because doing so would strip Rule 37 of any deterrent effect it might have on similarly inclined litigants.

**4. The writ should not be granted because the petitioners have failed to address an entirely separate alternative ground for the district court's decision.**

There is an independent basis for the district court's decision that petitioners have not addressed at all: petitioners were sanctioned pursuant to the court's inherent power to protect the integrity of the judicial process. Because this ground is sufficient to uphold the court's decision independent of its exercise of discretion under Rule 37 and because it remains un-

challenged, this Court has no reason to grant the petition for a writ of certiorari.

As the district court found, petitioners' behavior went beyond discovery abuse and created a separate legitimate basis for the exercise of the court's discretion. They pursued a remorseless pattern of perjury, subornation of perjury, and fabrication of evidence, and brazenly prepared a false affidavit under the name of the court they intended to defraud. *See* A33-34. The court found that petitioners "made a mockery" of "the entire court system" (hearing tr., Nov. 19, 1986 at 45) and, finally, imposed sanctions to "preserve the integrity of the judicial process" (pet. at A40).

Thus, the need to preserve the court's processes stands as a second—and unchallenged—pillar supporting the judgment. The federal courts possess the inherent powers that are "necessary to the exercise of all others," *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); and the "well-acknowledged" inherent power to levy sanctions for abusive litigation practices. *Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962). These powers include that of defaulting or dismissing a party who has "willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983).

Even without the authority of Rule 37, the district court had the power to remedy the abuses heaped upon it by petitioners. Because of this separate basis for the court's award, this Court need not reach the arguments put forth by petitioners and therefore should not grant a writ of certiorari.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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